THE STATE OF LOUISIANA:

Patent No. 870. N. S. L.

To all to whom these presents shall come, Greeting:

Whereas, W. V. Gilmore of the Parish of Orleans in the State of Louisiana, purchased per Certificate No. 659 N. S. L., June 22, 1887, The West half of South West quarter Sec. 17, South East quarter Sec. 18, East half of Sec. 19, West half of Sec. 29, East half of Sec. 30, East half of Sec. 31, and West half of Section No. Thirty two (32) in Township No. Eleven (11) South Range No. Twenty (20) East in the South Eastern, East of River Land District, containing One Thousand eight hundred & forty & 00/100 acres, according to the official plat of the survey of said lands in the State Land Office.

Now Know Ye, That the State of Louisiana, in consideration of the premises and in conformity with law in such case made and provided, has given, granted and sold, and by these presents does give, grant and sell unto the said W. V. Gilmore and to his heirs the above described land, to have and to hold the same together with all the rights, titles and privileges thereunto belonging unto the said W. V. Gilmore and to his heirs and assigns forever.

In Testimony Whereof, I, Samuel Douglas McEnery, Governor of the State of Louisiana, have caused these letters to be made Patent and the Seal of the State Land Office to be hereunto affixed.

Given under my hand at the City of Baton Rouge, on the 22 day of June in the year of our Lord, One Thousand Eight hundred and Eighty seven and of the Independence of the United States the one hundred and Eleventh.

By the Governor:

S. D. McENERY.

Record of Patent, Vol. 23, page —.

[Seal Land Office of the State of Louisiana.]

JAMES L. LOBDELL,
Register of State Land Office.

(Here follow maps marked pp. 132, 133, 134, 135, 136, & 137.)

[Endorsed.]

I hereby sell transfer assign and convey to Joseph C. Gilmore all my right title and interest *and* to the within patent and the land therein conveyed.

New Orleans, Sept. 1st, 1894.

W. V. GILMORE.

I hereby transfer assign and convey to the Louisiana Navigation Company, Limited, all my right title and interest *and* to the within patent and the land therein conveyed.

New Orleans, December Fourth Eighteen hundred and ninety four.

J. C. GILMORE.

Above transfer accepted for and on behalf for the Louisiana Navigation Company Limited.

[Seal Louisiana Navigation Company, Limited, N. O., La.]

W. V. GILMORE, *President.*

[Stamped:] Joseph C. Gilmore, Att'y & Counsellor, 10 Carondelet Street, New Orleans.

STATE OF LOUISIANA,
Parish of St. Bernard:

CLERK'S OFFICE, *October 15th,* 1888.

I do hereby certify that the within patent No. 870 was this day recorded in my office in book of Conveyances No. 17, fo. 195.

[Seal of the Clerk of the Parish of St. Bernard, State of Louisiana.]

J. R. DUCROS,
Clerk, ex Off. Recorder.

[Stamped:] Joseph C. Gilmore, Att'y & Counsellor, 10 Carondelet Street, New Orleans.

137½ Supreme Court of Louisiana.

No. 17594.

LOUISIANA NAVIGATION CO., LTD.,
VS.
OYSTER COMMISSION OF LOUISIANA, E. C. JOULLIAN CANNING COMPANY, and DUNBAR, LOPEZ & DUKATE COMPANY.

The sketch is presented in connection with the brief in reference to the position of Township Ten with relation to "Thalweg" and the location of top portion of "Creole Gap" in that Township, but only as a diagram as the sketch included in the opinion. The lower portion of "Creole Gap" can be extended by the maps of Township

Eleven in the Record. A blue print or copy of this sketch was mislaid or lost at the trial in the lower Court and this sketch has only now been found.

The Oyster Commission has all along in argument said the State would take its place in the case. "In ten days it would all be up with plaintiff." Then it has been given out in the public press that volunteer attorneys had tendered their services in a suit by the State which was under preparation and would be filed in January. The Attorney General may have drawn the boundary at giving his name to suits of this description since the "Boundary Case" where we see the fee of his office went to these outside counsel.

The recent cases in Great Britain cited in "Gould on Waters" (several Irish cases) accept the question of navigability as depending on fact and not on "ebb or flow of tide." These terms, like "high and low water mark," are old technical terms at common law and are relegated to the "obsolete." In our Louisiana county they have no significance in fact and in law and only tend to import the meaningless crotchets of the old common law which there have been thrown out in modern practice and cases. This sketch and printed extracts are offered in connection with reference to the same in brief.

Respectfully submitted,

EDWARD N. PUGH,
J. C. & THOS. GILMORE,
Attorneys.

The annexed sketch is submitted to the Court with leave to withdraw the same.

137¾ [Endorsed:] No. 17,594. Supreme Court of Louisiana. Louisiana Navigation Company, Limited, vs. Oyster Commission of Louisiana, E. C. Joullian Canning Co. and Dunbar, Lopez & Dukate Company. Map of Township Ten, showing relative position of "Thalweg". Also location of "Creole Gap." For line of "Thalweg" see Map Boundary Case, 202 U. S. p. 59, submitted as diagram with brief for rehearing. E. N. Pugh, J. C. & Thos. Gilmore, Att'ys.

138 Supreme Court of Louisiana.

No. 17594.

LOUISIANA NAVIGATION COMPANY, LTD.,
vs.
OYSTER COMMISSION OF LOUISIANA et als.

Agreement.

It is agreed between counsel for Louisiana Navigation Company Limited, Plaintiff in Error, and counsel for Oyster Commission of Louisiana and E. C. Joullian Canning Company and Dunbars, Lopez and Dukate Company, Defendants in Error, that the transcript in

the case of State of Louisiana vs. State of Mississippi (Boundary Case) No. 11 Original October Term 1905 of Docket of United States Supreme Court, lodged in the Supreme Court of the United States, is made part of the transcript in this case (Louisiana Navigation Company Limited vs. Oyster Commission of Louisiana, E. C. Joullian Canning Company and Dunbars, Lopez & Dukate Company) and that the said transcript in the case of Louisiana vs. Mississippi (Boundary Case) may be referred to by the Supreme Court of the United States as part of the transcript in this case without necessity of copying the said transcript in case of State of Louisiana vs. State of Mississippi in the transcript in this case or forwarding to the United States Supreme Court duplicate copies of the said transcript in Boundary Case with this transcript.

New Orleans April 18, 1910.

Otherwise without prejudice.

(Signed) JOHN DYMOND, JR.,
Att'y for Dunbars, Lopez & Dukate Company, E. C. Joullian Canning Co.

(Signed) JNO. C. WICKLIFFE,
Attorney for Oyster Commission of Louisiana.

(Signed) J. C. & THOMAS GILMORE,
EDWARD N. PUGH,
Attorneys for Louisiana Navigation Company, Limited, Plaintiff in Error.

(Endorsed:) No. 17594. Supreme Court of Louisiana. La. Nav Co. vs. Oyster Commission of La. et als. Agreement of Counsel Filed Apl. 18, 1910—(Signed) Paul E. Mortimer, Clerk.

139 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, de hereby certify that the foregoing 138 pages contain a full, true and complete copy of the proceedings had in the Civil District Court for the parish of Orleans, in a certain suit where the Louisiana Navigation Company, Limited, was plaintiff, and the Oyster Commission of Louisiana, E. C. Joullian Canning Company, and Dunbars Lopez and Ducate Company were defendants; and also, of all the proceedings had in this Supreme Court on the appeal taken by said plaintiff, which appeal is now on the files thereof, under the number 17,594, with the exception of the transcript of record in the case of the State of Louisiana vs. State of Mississippi, October Term, 1905, No. 11, Original, of the Supreme Court of the United States, and lodged in said Supreme Court of the United States, which transcript, in accordance with the agreement of counsel, page 138 of this transcript, is not copied in this transcript, but is part thereof.

COPY E

and is to be referred to by the Supreme Court of the United States, as a part of this transcript in accordance with the said agreement of counsel.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at the city of New Orleans, this 18th day of April, Anno Domini, one thousand nine hundred and ten, and of the Independence of the United States of America, the one hundred and thirty-fourth.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER, *Clerk.*

140 *Certificate of the Chief Justice.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Joseph A. Breaux, Chief Justice of the Supreme Court of the State of Louisiana, do hereby certify that Paul E. Mortimer is Clerk of the Supreme Court of the State of Louisiana; that the signature of Paul E. Mortimer to the foregoing certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal, at the city of New Orleans, this the 18th day of April, A. D. one thousand, nine hundred and ten.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice.

Endorsed on cover: File No. 22,123. Louisiana Supreme Court. Term No. 261. Louisiana Navigation Company, Limited, plaintiff in error, vs. Oyster Commission of Louisiana, E. C. Joullian Canning Company, and Dunbars, Lopez and Dukate Company. Filed April 23d, 1910. File No. 22,123.

BOUND CLOSE IN CENTER

Supreme Court of the United States

OCTOBER TERM, 1912.

Office Supreme Court
FILED
NOV 6 1912
JAMES H. McKEE

No. 40.

LOUISIANA NAVIGATION COMPANY, LIMITED,
PLAINTIFF IN ERROR.

versus

OYSTER COMMISSION OF LOUISIANA, E. C. JOULLIAN CANNING COMPANY, AND DUNBARS, LOPEZ AND DUKATE COMPANY.
DEFENDANTS IN ERROR.

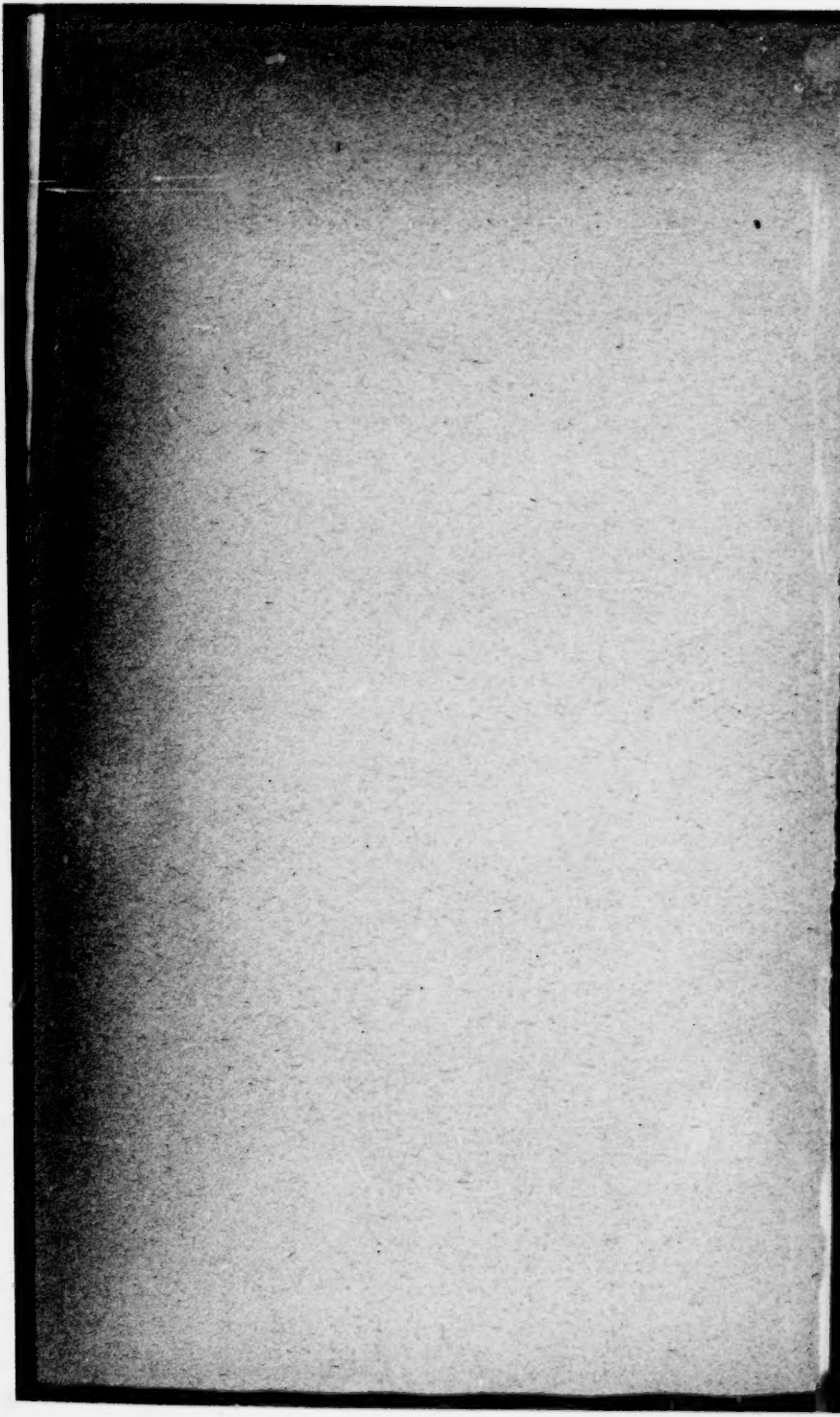
BRIEF FOR DEFENDANTS IN ERROR, E. C. JOULLIAN CANNING COMPANY AND DUNBARS, LOPEZ AND DUKATE COMPANY.

In Error to the Supreme Court of the State of Louisiana.

JOHN DYMOND, JR.,

Attorney for E. C. Joullian Canning Company, and Dunbars, Lopez and Dukate Company, Defendants in Error.

American Printing Co., Ltd., 535 Poydras St., New Orleans.



INDEX.

	PAGE
Statement	1
Analysis of petition	2
Analysis of prayer of petition	4
Defendant's exceptions	5
Opinion of Supreme Court of Louisiana	17
Argument	34

I.

The issues in this case must be decided by the laws of Louisiana. 39

II.

The State of Louisiana is the owner of the bottoms of the navigable water of the State, having acquired her title thereto by virtue of her inherent sovereignty as a State 41

III.

In the creation of the State of Louisiana, the United States of America did not reserve to itself the navigable water bottoms of the State of Louisiana 50

IV.

The Congress of the United States, in the swamp land grants of 1849 and 1850, gave to the State of Louisiana certainly no more than the United States had reserved to itself at the time the State of Louisiana was created 52

V.

In Louisiana the seashore is public and the waters of the sea are public, and the maps on file in this record show this locality to be the seashore and the sea 53

VI.

According to the laws of Louisiana, the bottoms of all navigable waters are public and the title thereto vests in the State 54

VII.

"According to the laws of Louisiana, those water bottoms within the State where oysters grow naturally are known as Natural Oyster Reefs, and have always been reserved from private ownership for the benefit of the general public of the State" 56

VIII.

PAGE

"Act 106 of the Legislature of the State of Louisiana, for the year 1886, to which plaintiff refers as the basis of its contract right, specifically provided that waters and water bottoms producing oysters naturally were reserved from private ownership for the benefit of the State, and were held as public property" 60

IX.

"The swamp land grant acts of Congress of 1849 and 1850 granted to the State of Louisiana land, and not the bottoms of navigable water"..... 61

X.

The surveys made by the United States Government, being the public surveys, fixed the rights of United States in the State of Louisiana, fixed the limits of the land, and fixed the limits of the water..... 72

XI.

These public surveys of the United States, and the patents issued and described in accordance therewith, and the areas of land mentioned in the patents, and described in accordance with the township plats of survey, showed that only land had been conveyed by said patents..... 72

XII.

Many of the patents acquired by plaintiff's authors in title are anterior to the adoption by the Legislature of the State of Louisiana of Act 106 of 1886, and therefore these lands must have been patented without any relation to said legislative act, and other of the patents of plaintiff's authors in title were issued subsequent to the repeal of said Act 106 of 1886, and therefore must have been issued without any relation to said legislative act 73

XIII.

That even if any of the patents forming the basis of title of plaintiff's authors in title were obtained at a time when Act 106 of 1886 was in effect, the right granted by this Act 106 of 1886 was merely a privilege, and appertains only to the *planting* of oysters, and did not appertain to the harvesting of the crops of oysters growing naturally, and was a privilege that the Legislature had a right at any time to revoke, and did not form the basis of any contract..... 75

XIV.

PAGE

The privileges granted by sections 2 of Act 106 of the Legislature of the State of Louisiana for 1886 were repealed by Act 110 of the Legislature of the State of Louisiana for the year 1892 79

XV.

"In accordance with the jurisprudence of the State of Louisiana, a purchaser of lands from the State gets only in acres what he buys and pays for per acre"..... 80

XVI.

"The laws and jurisprudence of the State of Louisiana do not recognize, as may be the case under some circumstances in the common law States, that a purchaser of a fractional section of land, at a stated rate per acre, gets as a bonus navigable water bottoms included within the limits of the remainder of his fractional sections"..... 81

XVII.

"The State of Louisiana is vested with full power and authority to control her navigable waters and to use the same, according to such laws as she may enact, for the purpose of oyster culture and the development of the oyster industry, within the limits of said State"..... 83

XVIII.

"The State of Louisiana has for a number of years been regulating the oyster industry in her navigable waters, and has evolved a comprehensive and effective system of laws for its development, and is entitled in the fostering and development of that industry to enforce its code of laws"..... 85

Opinion of the Supreme Court of Louisiana in the case of State *vs.* Bayou Johnson Oyster Company..... 100

LIST OF CASES CITED IN BRIEF.

PAGE

Acts of Louisiana Legislature, 1853..... 43
Acts of Louisiana Legislature, 1859..... 67
Acts of Louisiana Legislature, 1862..... 43
Acts of Louisiana Legislature, 1886..... 56, 60, 74, 75, 79, 80
Acts of Louisiana Legislature, 1892..... 57
Acts of Louisiana Legislature, 1896..... 57
Acts of Louisiana Legislature, 1902..... 57, 68
Acts of Louisiana Legislature, 1904..... 58
Acts of Louisiana Legislature, 1906..... 89
Acts of Louisiana Legislature, 1910..... 59
Act of Congress, February 11, 1811..... 51
Act of Congress, April 8, 1812..... 52
Am. and Eng. Ency. of Law, Verbo Fisheries..... 84
Andrus *vs.* Knott, 8 Pac., 763; 12 Or., 501..... 69
Acts of Louisiana Legislature regulating oyster industry..... 85
Barney *vs.* Keokuk, 94 U. S., 324..... 42, 45
Board of Commissioners Caddo Levee Dist. *vs.* Glassel, 120 La. An., 40 95
City of Oakland *vs.* Oakland Water Front Co., 50 Pac., 277, 285; 118 Cal., 150..... 69
Cooley on Taxation, chap. 6, p. 145..... 76
Den *vs.* Jersey Co., 15 How., 426..... 42
Dize *vs.* Lloyd *et als.*, 36 Fed. Rep., 651..... 87
Elliott *vs.* Stewart, 14 Pac., 416; 15 Or., 259..... 69
East Saginaw Mfg. Co. *vs.* City of East Saginaw, 13 Wallace, 373 76
Grand Lodge of Louisiana *vs.* City of New Orleans, 44 La. An., 659 79
Gould on Waters, 34, 72, 88..... 48, 49, 82
Genesee Chief, 12 How., 443..... 43
Goodtitle *vs.* Kibbe, 9 Howard, 471..... 45
Hass *vs.* Muir *et als.*, 65 Maryland, 586..... 79
Hogaboom *vs.* Eberhardt, 58 Cal., 231, 233..... 66
Hall *et al. vs.* Board of Com'rs Bossier Levee Dist., 111 La. An., 913 81
Hardin *vs.* Jordan, 140 U. S., 371..... 39, 40, 42, 98
Ill. Cen. R. R. Co. *vs.* Illinois, 146 U. S., 387..... 42, 45
Keeran *vs.* Allen, 33 Cal., 542, 546..... 65
Keeran *vs.* Griffeth, 31 Cal., 461, 462, 466..... 65
Knight *vs.* United Land Association, 142 U. S., 141..... 42, 47
Louisiana Civil Code, art. 450..... 53
Louisiana Civil Code, art. 451..... 53
Louisiana Civil Code, art. 452..... 53
Louisiana Civil Code, art. 453..... 54

PAGE

Louisiana Civil Code, art. 509 93
Martin *vs.* Waddell, 16 Peters, 367 ..... 42, 44, 45
Mumford *vs.* Waddell, 6 Wall., 423 42
Morris *vs.* United States, 174 U. S., 194, 236 ..... 42, 72
Mann *vs.* Tacoma Land Co., 155 U. S., 284 47
Milne *vs.* Girodeau, 12 La. An., 325 ..... 55, 82
McDade *vs.* Bossier Levee Board, 109 La. An., 625 81
McCrady *vs.* Virginia, 94 U. S., 391 84
Morgan *vs.* Nagodich, 40 La. An., 246 94
Miller *vs.* Tobin (U. S.), 18 Fed., 609, 614 64
Merrill *vs.* Tobin (U. S.), 30 Fed., 738, 739 65
Newhall *vs.* Sanger, 92 U. S., 761 47
Packer *vs.* Bird, 137 U. S., 662 ..... 40, 42
Pollard *vs.* Hagan, 35 How., 212 ..... 42, 45, 46
People *vs.* Morrill, 26 Cal., 336 68
Pacific Steam Whaling Co. *vs.* Alaska Packers' Ass'n, 72 Pac., 161, 162; 138 Cal., 632 69
People *vs.* Davidson, 30 Cal., 379, 385 69
Proctor *vs.* Wells, 103 Mass., 216 84
Rector of Christ Church of Philadelphia *vs.* County of Philadelphia, 24, How., 300 77
Rondell *vs.* Fay, 32 Cal., 354 68
Rundle *vs.* Delaware & R. Canal Co., 14 How., 80 42
Richardson *vs.* Dinkgrave, 26 La. An., 651 8
State *vs.* Pacific Guano Co., 22 S. C., 50 71
Shively *vs.* Bowlby, 152 U. S., 341 ..... 39, 42, 45, 46, 47
Smith *vs.* Maryland, 18 How., 71 42
San Francisco *vs.* Le Roy, 138 U. S., 656 42
Sapp *vs.* Frazier, 51 La. An., 1718 ..... 43, 55
Sanger *vs.* Newhall, 92 U. S., 761 62
San Francisco Savings Union *vs.* Irwin (U. S.), 28 Fed., 708, 712 ..... 64, 66
State of Louisiana *vs.* State of Mississippi, 202 U. S., 37 97
State of Louisiana *vs.* Bayou Johnson Oyster Co. 99, 100
Thompson *vs.* Thornton, 50 Cal., 142, 144 65
United States *vs.* Pacheco, 2 Wall., 587 42
Walker *vs.* State Harbor Com'rs., 84 U. S., 648, 650; 17 Wallace, 21; L. Ed., 744 70
Walker *vs.* Marks (U. S.), 29 Fed. Cas., 36, 37 69
Wever *vs.* State Harbor Com'rs, 18 Wall., 37 42
Withers *vs.* Buckley, 20 Howard, 84 45
Zeller *vs.* Yacht Club, 34 La. An., 838 ..... 53, 54, 82

Supreme Court of the United States

OCTOBER TERM, 1912.

NO. 40.

LOUISIANA NAVIGATION COMPANY, LIMITED,

PLAINTIFF IN ERROR.

VERSUS

OYSTER COMISSION OF LOUISIANA, E. C. JOULLIAN CANNING COMPANY AND DUNBARS, LOPEZ & DUKATE COMPANY,

DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR, E. C. JOULLIAN CANNING COMPANY, AND DUNBARS, LOPEZ & DUKATE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUSIANA.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

The main, and in fact only, proposition involved in this case, is one of law, and is as follows:

Under the laws of the State of Louisiana, does a land patent issued by the State of Louisiana, conveying fractional sections of land of a given number of acres, the land being deescribed according to a plan of survey, which shows the

leasing or encroaching on petitioner's private property; and that any assertion of such right by defendants, conflicts with Article 1 of Section 10 of the Constitution of the United States.

(10th.) That petitioner, through the authors of its title, has been in possession by title as owner for more than thirty years, and for more than 10 years by just title.

(11th.) That Act 52 of the Louisiana Legislature of 1904, as amended by Act 178 of 1906, contains more than one object in its title, and violates Article 31 of the Constitution of Louisiana, and that the other provisions of Act 52 of 1904 defeat the conditions upon which public lands were donated by Congress to the State of Louisiana for drainage and reclamation purposes; that the system of leasing water bottoms, as provided by Sections 10 to 18, of Act 178 of Louisiana of 1906, is not practicable and is violative of Articles 58 and 195 of the Constitution of Louisiana; that the other sections of said act violate Article 1, Section 10, paragraph 3 and Article 1, section 8, paragraph 3, and the Fourteenth amendment of the constitution of the United States.

The prayer, however, of the plaintiff's petition, is not as broad as the allegations of the petition would imply and it then follows and this prayer of the petition, when also analyzed, is seen to seek the following relief:

(a.) That the defendants may be enjoined from slandering petitioner's title to and from trespassing upon petitioner's property, and the said places known as *"Creole Gap"* and *"Grand Pass."*

(b.) That the defendants may be enjoined from interfering with petitioner's use and enjoyment of its steam boat "CARRIE."

(c.) That the defendants be enjoined from attempting to lease, grant or license others to fish in the said places, as described in petitioner's title.

(d.) That the defendants should render an accounting to the plaintiff for the oysters in the shell taken by them from said property, and plaintiff should have judgment for the value thereof.

(e.) That the plaintiff should have judgment against the Oyster Commission of Louisiana, and the E. C. Joullian Canning Company, in the sum of $6,000.00 and for costs and general relief.

An injunction issued as prayed for, upon plaintiff giving bond in the sum of $2,500.00, the proceedings having been instituted in Division "C" of the Civil District Court for the Parish (County) of Orleans, State of Louisiana.

To the petition of plaintiff, exceptions (demurrers) were thereupon filed in court, in said suit, by the Dunbars, Lopez & Dukate Company, and the E. C. Joullian Canning Company, to the following effect.

1st. That plaintiffs' petition disclosed no cause of action.

2nd. That plaintiffs' petition was too vague and indefinite to be safely answered unto.

The Oyster Commission of Louisiana, the other remaining defendant, through its Counsel, thereupon also filed exceptions to said petition to the following effect:

1st. That the civil process of injunction was being illegally used to restrain the enforcement of criminal laws of

Louisiana, with the enforcement of which, the said defendant was charged.

2nd. That the petition of plaintiff disclosed no cause of action.

3rd. That the petition of plaintiff was too vague and indefinite to be safely answered unto.

All of these exceptors asked that their exceptions be maintained, and that the suit of plaintiff be dismissed.

The Laws of Louisiana and the practice in said State, the Code of Practice of Louisiana, Article 741, Richardson vs. Dinkgrave, 26 La. An. 651, provide that, without waiting for the case to be reached on its merits, in the usual course of time, defendants may, because of the summary character of the relief sought, at any time move the court on rule to dissolve or modify the injunction that was issued exparte, and motions to that effect were filed by all three defendants. The motions to dissolve the injunction as filed by the E. C. Joullian Canning Company and the Dunbars, Lopez & Dukate Company are identical and set forth the following reasons for urging the dissolution of the injunction.

1st. That plaintiff's petition did not adequately and properly describe *"Creole Gap"* and *"Grand Pass,"* on which the trespasses were alleged to have occurred and did not adequately describe its title to said localities.

2nd. That movers are engaged in the Oyster industry in Louisiana, and, as licensees of the State of Louisiana, under licenses issued through the Oyster Commission of Louisiana, are legitimately engaged in the business of securing oysters as raw material for their canning factories.

3rd. That *"Grand Pass"* and *"Creole Gap,"* are bodies of natural, public, navigable waters, situated in the Parish

of St. Bernard, State of Louisiana, the former, connecting the waters of Mississippi Sound through Oyster Bay, to those of Chandeleur Sound and the Gulf of Mexico, and the latter, leading or opening into Mississippi Sound, and have been known as open public navigable waters of the State of Louisiana, since the earliest surveys.

4th. That said waters of *"Grand Pass"* and *"Creole Gap,"* contain, and have always contained, natural oyster reefs and that such natural oyster reefs, have always been reserved from private ownership, since the earliest oyster legislation in said state, (Act 106 of 1886).

5th. That the *lands* in said locality were first surveyed in 1844, and 1845 by the United States and said surveys were adopted by the State of Louisiana, and formed part of the archives of its State Land Office; and that all patents to lands, issued by the State of Louisiana in that locality, were made and described according to said plans of survey.

6th. That this survey clearly separated the lands from the waters in that locality, and fixed the area of the land.

7th. That the movers in their rule, cited the only patents under which plaintiff could claim title at all, to any lands in that locality, and that all of these cited patents, described the land conveyed as being in accordance with said plans which separated the lands from the waters, and that no law existed, authorizing the conveyance of the bottom of navigable water, and that the water bottoms, as such navigable water bottoms, were never conveyed by said patents.

And in the alternative, in the event the suit was not dismissed by the court, the movers asked that the injunction bond, furnished by plaintiff, should be increased, so as to more

adequately protect them, pending the final trial of the issues involved.

After these exceptions, and these motions to dissolve had been filed, the plaintiff then asked the court to take these motions to dissolve as an answer to the merits, and to try the case thereon. This, the court refused to do, (Tr. p. 22), as it recognized movers' right to move to dissolve the injunction that had been issued ex parte. (*Richardson vs. Dinkgrave*, 26 La. An. 651.)

Testimony was then taken in court, on the motion as filed (trans., pages 33 to 34) and this evidence showed that for years in the past, oyster fishermen had been accustomed without restraint, to fish large quantities of oysters from the waters of *"Grand Pass"* and *"Creole Gap,"* and that prior to the filing of this injunction suit, no one had ever been molested, while fishing oysters in those localities.

Documentary evidence was also offered by the plaintiff to show that the sections as described by number in plaintiff's title, had been selected by the state, under the provisions of the Act of Congress of March 2nd, 1849 and were approved to the State, but the certificates did not pretend to show what area in acres was approved as being contained in any section. (Trans. pp. 34 & 35.)

After hearing, the court sustained the motion to increase the injunction bond, (transcript page 23), but did not dismiss the suit. On the contrary it sustained the exceptions which had been filed by the defendants to the effect that the petition was too vague and indefinite to be safely answered unto, and permitted the plaintiff to amend its petition. (Transcript, page 36.)

The court however, on its own motion, set aside its order to increase the injunction bond, as it claimed that this prayer for an increase of bond was only made in the alternative, and that it could not at the same time, sustain defendants other contentions, and also increase the bond under their prayer. (Transcript, p. 35).

Taking advantage of the permission of the court, granted to it, to amend its petition, plaintiff thereupon prepared and filed its supplemental and amended petition, in which it alleged:

Title to the property which it claimed to own. These are evidenced by patents and acts of sale, filed by it in the records, as part of the supplemental petition, (transcript, pp. 82 to 95).

It also filed maps descriptive of the locality and its alleged property. (These maps are inserted in the transcript at page 94).

It also claimed certain undescribed rights of *accretion.*

Thereupon, all defendants again filed exceptions of no cause of action to the original and amended and supplemental petition of plaintiff, taken in connection with the Exhibits which it had attached to its petition and filed in the record.

Honorable George H. Theard, Judge of Division E, of the Civil District Court, for the Parish of Orleans, State of Louisiana, before whom these proceedings were tried, and who heard the argument of counsel, thereupon sustained defendants exceptions, to the effect that the plaintiff's petition disclosed no cause of action and he thereupon dismissed plaintiff's suit. (Trans. p. 40).

The ground of argument orally made by defendants, in support of their exceptions of no cause of action, were that,

taking plaintiff's petition, supplemental petition and exhibits, namely, its title papers and maps, to be true in all their averments, nevertheless, the plaintiff's petition and supplemental petition, did not set forth a cause of action entitling it to relief at the hands of the court, under the laws of the State of Louisiana, for the following reasons which were sustained by Judge Theard, to-wit:

1st. That the lands in controversy, being located in the State of Louisiana, were, in their conveyance, and in the rights appurtenant thereto, governed by the laws of the State of Louisiana.

2nd. That when the State of Louisiana was created by the act of congress of April 8th, 1812, the State of Louisiana, acquired by virtue of her inherent sovereignty as a state, the lands representing the bottoms of all navigable waters and all lands subject to tidal overflow.

3rd. That the "waste and unappropriated lands" reserved to the United States, by the enabling act of congress of February 11th, 1811 and the act of Congress, creating the State of Louisiana of April 8th, 1812, were lands other than the bottoms of navigable waters and lands subject to tidal overflow, belonging to the State of Louisiana, by virtue of her inherent sovereignty, and that these navigable water bottoms and tidal overflow lands were not reserved by the United States.

4th. That the classification between lands as such, reserved to the United States and the bottoms of navigable waters and lands subject to tidal overflow, were, as to those in the locality in question, fixed by the survey as made by the United States in 1844 and 1845, as shown by the Township plats filed, which township plats showed by their own con-

cents, the fractional portion of each section that was considered land and gave its individual area and conversely necessarily showed by the area omitted, that is, the difference between the area given and the full normal area of a section, the area of each that was water, and therefore not included in the approval.

5th. That when the areas of land in the locality of plaintiff's property, were selected by the State of Louisiana from the United States, under the swamp land grants of Congress of 1849 and 1850, and approval was made by the United States, only such areas as represented lands were selected in each section, the area of the water or the bottoms of navigable water, already belonging to the State of Louisiana, by virtue of her inherent sovereignty, and therefore did not require selection.

6th. That the areas as given in plaintiff's patents show that the plaintiff only acquired title to the land, and did not acquire title to the navigable water bottoms, as will be seen from the following statement, giving the areas conveyed by plaintiff's patents, and also giving the areas that plaintiff would have received, had it bought and paid for the entire sections, or portions of sections, involved in its patents, to-wit:

Patent.	Description.	Area in Acres.	Full Area in Acres of Sections involved.
194	Sec. 23, T. 10-R. 20		640
	24		640
	25		640
	26		640
		Total 468.48	Total 2560

195	Sec. 33 T. 10-R. 20		640
	34		640
		Total 596.72	Total 1280
196	Sec. 27, T. 10-R. 10		640
	28		640
	32		640
		Total 380.40	Total 1920
4955	Sec. 20, T. 10-R. 20		640
	21		640
	28		640
	29		640
		Total 51.	Total 2560
706	W½ of W½, Sec. 4,		
	Tp. 11, R. 20.		160
	N.E.¼, Sec. 5,		
	Tp. 11, R.-20.		160
		Total 276.	Total 320
1038	Sec. 5-T. 11-R. 20		640
	6		640
	7		640
	8		640
	SW¼, Sec 18,		160
	NE¼ of NW¼, Sec. 19		
	T. 11-R. 20		40
	W½ of Sec. 31-T. 11-		
	Range 20.		320
		Total 990.	Total 3080

1039	Sec. 13-T. 11-R. 19		640	
		Total	320.	Total 640
5093	E½ of NW¼, Sec. 4-T. 11-R. 20		80	
		Total	33.	Total 80
961	S½ of Sec. 5 T. 12 R. 20		320	
	NW¼ 5		160	
	E½ of E½ of 6		160	
	SW¼ of SE¼ of 6		40	
	NE¼ of 7		160	
	N½ of SE¼ of 7		80	
	NW¼ 8		160	
		Total	1080.	Total 1080
1040	W½ of NE¼, Sec. 6 T. 12 R. 20		80	
	E½ of NW¼, Sec. 6		80	
		Total	160.	Total 160
761	Sec. 20-T. 11-R. 20		640	
		Total	640.	Total 640

870	W½ of SW¼,	Sec. 17-T,	11-R, 20	80
	SE¼	18		160
	E½	19		320
	W½	29		320
	E½	30		320
	E½	31		320
	W½	32		320
			Total 1840.	Total 1840

7th. That the foregoing constitutes an analysis of the twelve patents from the State which plaintiff alleges constituted the foundation of its title. It will appear therefrom, that in the first eight, the sections are all described in their respective patents as being fractional, thereby meaning that the total area of the section, is not embraced in the conveyance. It will also be noticed that where it was intended to convey the whole of a section, or the whole of a designated part of a section, evidence of this was positively given in the patents, as shown by the last four patents, where the area involved and the area conveyed are the same.

8th. That it will be noticed that the areas given above, as taken from the patents of plaintiff's authors in title, correspond with the area acquired by plaintiff, as shown by its title, and sued for herein, (trans. p. 42) in fact, are exactly the same.

9th. That the areas of these patents, stated in totals are as follows:

194	468.48	2560
195	569.72	1280
196	380.40	1920

4955	51.	2560
706	276.	320
1038	990.	3080
1039	320.	640
5093	33.	80
961	1080.	1080
1040	160.	160
761	640.	640
870	1840.	1840
	Total: 6,808.60	Total: 16,160.00

10th. That, in other words, the plaintiff's patents conveyed to it, but 6,808.60 acres of land, as claimed in its petition (transcript p. 1 designating the area as about six thousand eight hundred and nine acres) and yet it claimed its argument, in the lower court, 16,160.00 acres; and that, as to the difference, viz: 9,351.40 acres of water, plaintiff's pleadings and exhibits, show it has no title, and as to the possession and title to such water area, its petition disclosed therefore, no cause of action.

11th. That the water area is shown, as such, on the plats of survey on file in the State Land Office, according to which plats, the *lands*, as purchased by plaintiff's authors in title, were described in the patents issued by the state, and this water area was therefore not included in said patents.

12th. That according to the laws of the State of Louisiana, the title to the bottom of all navigable waters is positively vested in the State for the benefit of all of the people of the State, and is not, and never has therefore, been susceptible of private ownership.

13th. That no law of the State of Louisiana, ever authorized any officer of the state government to sell to private individuals, bottoms of the navigable waters of the state and therefore, that no sale, as evidenced by any patent issued by the state, ever conveyed title to such navigable water bottoms.

14th. That according to the maps and surveys filed by plaintiff, including the United States Coast and Geodetic Survey *"Grand Pass"* and *"Creole Gap,"* are shown as open navigable waters and plaintiff could not acquire any title thereto.

It was, for the foregoing reasons, that the Civil District Court of Louisiana, held that plaintiff's petition disclosed no cause of action, it being apparent from the argument of plaintiff's counsel in the case, that the sole and only point at issue and the one upon which the case turned, was whether or not plaintiff could claim title to and possession of the entire area of a *section,* regardless of whether it was land or water, when its title called only for a title to land, that is, did, or did not, the rights to the water within the limits of the section go with the land as a matter of course, whether the waters were navigable or not.

The Court of original jurisdiction, having sustained these exceptions of the defendants and having dismissed the plaintiff's suit, the plaintiff thereupon took an appeal from this judgment of the lower court, to the Supreme Court of the State of Louisiana, the court of last resort in that state.

After hearing argument and considering the briefs filed by all parties in that court, the Supreme Court of the State of Louisiana, reversed the decision of the Civil District Court,

and remanded the case anew to that court for trial, rendering an opinion, which we here reproduce:

OPINION OF THE COURT.

Mr. Justice Monroe.

No. 17,594.

LOUISIANA NAVIGATION CO., LTD.

vs.

OYSTER COMMISSION OF LOUISIANA, et als.

Appeal from the Civil District Court, Parish of Orleans, Theard, J.

Monday, January 17th., 1910.

Plaintiff, asserting title to, and possession of, certain lands which form part of the low peninsula of the parish of St. Bernard which projects into the waters constituting Mississippi Sound and the Gulf of Mexico, complains that the Oyster Commission of Louisiana and its (alleged) licensees, the E. C. Joullian Canning Company and Dunbars, Lopez & Dukate Company, have been and are, slandering said title and possession, trespassing upon the property, carrying away oysters and shells therefrom and interfering with it (petitioner) in the development and use of the same, and its petition concludes with the prayer that the parties named be cited, and further: "that the annexed affidavit and bond considered, a preliminary injunction issue, injoining and restraining" them, "their agents and employees, and all other parties who may be discovered slandering petitioner's possession or title, or trespassing on petitioner's property and the said places known as Creole Gap and Grand Pass, aforesaid, and from interfering with

the full enjoyment of the said property of your petitioner and the employment of the said steamboat, "Carrie," her officers and crew, and petitioner's employes, and from attempting to lease, grant or license, to others, for fisheries or other purposes, the said places or property, situated within petitioner's survey, as described in petitioner's title. That the said parties defendant may be ordered to account to petitioner for the oysters in the shell taken away from said property and that petitioners have judgment for the amount shown to be due petitioner by said account. Petitioner further prays that there be judgment * * * * against the said defendants, the Oyster Commission of Louisiana and the E. C. Joullian Canning Company, in solido, for damages, actual and exemplary, for said joint trespass of the said parties, in the sum of $6,000, as above set forth, and maintaining and making perpetual the preliminary injunction against said defendants and all others found questioning, impeaching and slandering petitioner's possession and title or trespassing upon petitioner's said property, as described by petitioner's title and patents and the government surveys, and against all parties, in solido, for costs and general relief."

The preliminary injunction issued as prayed for, on a bond of $2,500, and thereafter, the defendants excepted, on the grounds that the petition was too vague and indefinite in its allegations and that it disclosed no cause of action, and the Oyster Commission further excepted, that "the suit is an attempt, on the part of plaintiff, to stop "and prevent, by the civil process of injunction, the execution and enforcement of the criminal laws of the state * * * which it is the duty of this appearer to enforce."

Defendants then moved that the injunction be set aside, or the amount of the bond increased, and

plaintiff moved that the motions so filed be taken as answers, and, both motions having been disposed of, adversely to the movers, there was judgment, on the exceptions as follows:

"It is ordered that the said exceptions be maintained in so far as to order the plaintiff to amend its petition, within five days, by setting forth, more clearly and definitely, the description of the property referred to in its petition, and that, upon failure to comply with this order * * * plaintiff's suit be dismissed as in case of non-suit, at its cost; in other respects the said exceptions are overruled."

Thereafter, plaintiff filed a supplemental petition, annexing and making part thereof certain patents and other muniments of title, as in compliance with the order that it should set forth more clearly and definitely the description of the property referred to in its petition, and defendants, thereupon, renewed the exception of "no cause of action," which was sustained by a judgment which rejects plaintiff's demand and dismisses its suit, and, from which plaintiff prosecutes this appeal. The petitions are rather long and we shall, therefore, and in order to determine whether they disclose a cause of action, copy only those parts which purport to describe the property trespassed upon—stating, as well as we can, the substance of the other allegations:

In the original petition, it is alleged: "That petitioner * * * is the owner and in possession of certain lands, in the parish of St. Bernard * * *, on the coast line, bounded on the north by the waters described as the Mississippi Sound, or Grand Pass of the Gulf of Mexico, all acquired by petitioner by mesne conveyance from the State of Louisiana; that the said lands are submerged and swamp and overflowed lands and embrace the places known as Creole Gap, in S.

32; T. 10 S; R. 20 E., and Ss. 4 and 5 T. 11 S., R. 20 E., of the official plat of survey of said lands in the United States, and State, land offices and other water bottoms, in the limits of petitioner's survey, extending across, at the extreme western end of petitioner's land, to the western section lines of sections 6 and 7, embracing the place, or small pass, known as Grand Pass, in the said sections 6 and 7, in T. 11 S; R. 20 E., as distinguished from Grand Pass of the Gulf of Mexico, aforesaid; the said land extending southerly, or southwesterly, to a place designated as Drum Pass, and comprising about 6,809 acres."

The petition then goes on to state that the lands in question were donated by the United States to the State, acceped by the State, and sold to petitioner's author as swamp and overflowed lands; "that petitioner has been in possession, as owner and by title, for more than 30 years, through the author of its title, and, for more than ten years, by just title;" that it has gone to great expense in developing the property, and has operated a steamboat, known as the "Carrie," in that connection; that the Oyster Commission of La., and its licensees, the E. C. Joullian Canning Co., and the Dunbars, Lopez & Dukate Co., and other parties, unknown, have slandered its title and have combined to take physical possession of the property; that boats owned by the said parties, or in which they are interested, have taken oysters therefrom, and owe an accounting therefor; that the Dunbars, Lopez & Dukate Co., applied for a lease of said property; that the Oyster Commission, by threats of arrest and imprisonment and criminal prosecution, under color of act 52 of 1904 and Act 178 of 1906, attempt to intimidate petitioner from pursuing the business for which it was organized; that its ownership of the property was notorious and that it placed signs thereon giv-

ing further notice to that effect; that the Oyster Commission, its president, agents or employees, on or about November 27, 1908, entered upon said property and cut down and carried away said signs, and ordered its licensee, the Joullian Co., and other parties, to continue fishing and carrying off petitioner's property, and that said Company so continues; and that said acts constitute a joint trespass by said parties, for which they are liable, in solido, and which prevents the peaceful occupation, by petitioner, of said land; that said lands are valuable for fisheries or reclamation; but petitioner has paid all taxes thereon; and, that the use thereof is worth more than $25,000; that said lands and petitioner's business are not subject to the license taxes, restrictions, penalties, prohibitions, forfeitures, etc., imposed by the said acts of 1904 and 1906; that petitioner has been damaged by the acts of the defendants in the sum of $5,000, and is entitled to $1,000 by way of exemplary damages; and that said acts will be continued unless prohibited by injunction; that the provisions of the acts of 1904 and 1906, do not conflict with petitioner's rights; but, should it be so considered, then, that they contravene sec. 10 of art. 1 of the constitution of the United States, as also certain provisions of the State Constitution (which are specified).

Wherefore, petitioner prays &c., (as heretofore set forth)

The supplemental petition alleges: "That, in obedience to the order of the court * * *, plaintiff files herewith a description of the property of petitioner, as originally derived by its authors from the State of Louisiana, and conveyed to, or acquired by mesne conveyance by petitioner, and comprising the northeast extremity, or end, of the peninsula of St. Bernard, as outlined and defined in the "Boundary Case," be-

tween the States of Louisiana and Mississippi, * * *, establishing the boundary between the two states; that the said part of said peninsula is also known as "Isle a Pitre," or the "Louisiana Coast Line," the said decision showing the "thalweg," or boundary, to run between the said Isle of Pitre and Cat Island. Petitioner shows that its possession embraces the whole of the territory known as the "Isle a Pitre," and the lands described in the annexed transfer, made part hereof; that the said sections and fractional sections of land, or upland, and land under water, therein set forth, adjoin and from one piece, or block, of swamp and overflowed land, continuously, or diagonally, in the sections, or fractional sections, described, through T. 10 S; R. 20 E; T. 11 S; R. 20 E., and into T. 12 S. R. 20 E; and S. 13, in T. 11 E; R. 19 E., all in the South Eastern, East of River, Land District, Parish of St. Bernard, of which plaintiff holds possession, as set forth in the said several patents and mesne conveyances, as will fully be shown on the trial of this case; that petitioner files herewith a plotted diagram of the whole of said property and a copy of a map of the State Land Office of the said T. 10 S; R. 20 E. * * * showing the said islands and portions of said land in said T. 10 S.; R. 20 E., and the United States Coast Survey chart, No. 190, issued Nov., 1887, and refers to the several maps or charts contained in the transcript and report of the decision of the said "Boundary Case," 202, U. S. p. 1, et seq., showing, in detail, the location of the places known as Creole Gap, in T. 10 S. R., 20 E., and T. 11, S. R. 20 E., and Grand Pass, in T. 11 S. R., 20 E., lying within the limits and areas of petitioner's survey, and the said patents, showing the boundaries of said property and petitioner's possession and enjoyment of the said property, together with all the rights of accretion, advan-

tages and appurtenances thereunto belonging", etc. "Wherefore, petitioner prays" (as in the original petition). There is annexed to this petition an act, under private signature, of date Oct. 10, 1894, whereby J. C. Gilmore, "for valuable consideration, sells and transfers to the Louisiana Navigation Co., all his right, titlee and interest in the following described lands, to-wit:

"Certain lands situated in the Southeastern Land District of Louisiana, in the parish of St. Bernard, embracing the whole of the island known as Isle a Pitre, and other lands, viz:"

First. The fractional sections, Nos. 23, 24, 25, and 26, in T. 10 S. R. 20 E., containing 468.78 acres.

Second .The fractional sections 33 and 34, in Tp. 10, S. R. 20 E., containing 569.72 acres.

Third. The fractional sections Nos. 27, 28 and 32, in T. 10 S. R. 20 E., containing 380.40 acres.

Three islands in Sections 20, 21, 28 in T. 10 S. R. 20 E., containing 51.40 acres.

The fractional West half of S. 4 and fractional N. E. 1-4 of S. 5, in T. 11, S. R. 20 E., containing 276 acres.

The fractional sections 5, 6, 7, and 8, S. W. ¼ of S. 18; N. E. ¼ of N. W. ¼ of S. 19; and W. ½ of S. 31, in T. 11, S. R. 20 E., containing 990 acres.

All of fractional section No. 13, in T. 11, S. R. 19 E., containing 320 acres.

The east fractional ½ of N. W. ¼ of S. 4, T. 11 S. R. 20 E., containing 33 acres.

The S. ½ of N. W. ¼ of S. 5; E. ½ of E. ½ and S. W. ¼ of S. E. ¼ of S. 6; N. E. ¼, N. ½ of S. E. ¼ of S. 7; N. W. ¼ of S. 8; in T. 12 S. R. 20 E., containing 1,008 acres.

The W. ½ of the N. E. ¼ and E. ½ of S. 6; T. 12 S. R. 20 E., containing 160 acres.

All of S. 20 T. 11 S. R. 20 E., containing 640 acres.

The W. ½ of S. W. ¼ of S. 19; W. ½ of Section 29; E. ½ of S. 30, E. ½ of Sec. 31; and W. ½ of S. 32; T. 111, S. R. 20 E., containing 1840 acres. "Together with all the rights of accretion, rights, ways, advantage and appurtenances thereto belonging," etc.

The descriptions thus given (in the act of transfer in question) are taken, with some inaccuracies, from patents, also annexed to the petition, issued by the State of Louisiana, most of them, to plaintiff's transferrer, butt, several, to other persons, and all of them reading, tthat the lands are sold "according to the official plat of the survey of the said lands in the State Land Office." The survey referred to seems to have been made in 1845, and, from the copies which plaintiff has filed, aided by an unofficial plat of later date, also filed by plaintiff, we have prepared the subjoined sketch, upon a reduced scale, which, with no pretentions to absolute accuracy, may be of some assistance. On the official copy, from which it was mainly, taken, the section and township lines, so far as they go, are alll dotted, and some of them, including those which traverse the extreme point of land, at the top of the sketch,

(see diagram, trans. p. 79.)

are in red ink (indicating as we understand it, that they are not to be found on the original). "Creole Pass" (by that name) does not appear on any of the plats, but the name "Little Bayou Pere," is given, on the unofficial sketch, to a bayou extending across the line between townships 10 and 11, and, as Creole Pass is described, in the supplemental petition, as being in these townships, it may be that "Little Bayou Pere" is another name for it.

We find that, on one of the plats incorporated in the transcript of the record in the case of the State of Louisiana vs. State of Mississippi (which we are invited to consider), the whole of the land, extending (according to the annexed sketch) between the points which we have designated as A and B, respectively, is called Isle A Pitre, and, in some of the plats in the same transcript, the body of water lying to the northward of Isle a Pitre is called Mississippi Sound.

OPINION.

The position of the plaintiff, as developed in the argument of the case is, that its patents to fractional sections carry with them title to all the land in the sections, submerged as well as dry, and (from the argument) we understand its particular complaint to be, that the Oyster Commission, and its licenses, have been, and are interfering with its use and enjoyment of the submerged portions of the sections in question (especially those lying beneath the waters of Creole Pass and Grand Pass) by removing oysters therefrom and by threatening it (plaintiff) with the penalties of the law, for dealing with those lands as its own.

Counsel for the Oyster Commission relies upon two grounds in support of his exception (of no cause of action). He says, in his brief: "The first ground is, that, this being a suit to test the title of lands claimed both by the plaintiff and the State, the Oyster Commission, being merely a department of the State government charged with certain functions, can not stand in judgment, in a suit concerning the title, that, belonging to the State; and the State therefore, is the only party who could try this question with the plaintiff." The other ground (relied on by all the defendants) is, that the submerged lands are not included in plaintiff's patents and that having exhibit-

ed those muniments of title, as part of its allegation of possession, as owner, plaintiff has put itself out of court.

Considering the ground first stated, it would hardly do to say that, because an alleged trespasser is without capacity to stand in judgment with respect to the title to the property trespassed on, the party claiming to be in possession, as owner, has no standing to protect such possession.

What the court decided in the "Chauvin" case was, that, the plaintiff, having enjoined the Oyster Commission from trespassing upon, and interfering with, his enjoyment of lands claimed by him, and having exhibited a patent from the State which embraced the lands so claimed, the Oyster Commission had no standing to attack the title so exhibited. Chauvin vs. Oyster Commission, 121 La. 10.

The other ground replied on presents the question, whether the patents exhibited by the plaintiff now before the court conveyed the property which plaintiff is seeking to protect, or whether that property is part of the public domain, the administration of which is vested in the Oyster Commission. For the support of their view of this question, counsel for plaintiff cite decisions of the Supreme Court of the United States, of the Supreme Court of Indiana, and Michigan and of the English Courts, all, interpreting and applying the common law, as administered in England, and, possibly, as administered in some of the States, mentioned, and all dealing with cases essentially different from that here presented. According to the Common Law of England, there is no navigable water save that which is within the ebb and flow of the tide, and a grant of land bordering upon a non-navigable stream, carries the title to the middle thread of the stream. In this country, however, all streams are navi-

gable, in the legal sense, which are navigable in fact, and by concurrence of all authority, grants of land bordering upon navigable streams, or tide water, carry the titles no further than high water mark. This question was considered in the case of Packer vs. Bird, 137 W. S., 661, in which Mr. Justice Fields, as the organ of the Supreme Court of the United States, said: "It is undoubtedly the rule of the common law that the title of owners of land bordering upon rivers above the ebb and flow of the tide extends to the middle of the stream, but, that, where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high water mark * * *. In England, this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because, there, the ebb and flow of the tide constitute the usual test for the navigability of the stream. * * * In this country, the situation is wholly different. Some of our rivers are navigable for many hundreds of miles above the limits of tide water, and, by vessels larger than any which sailed upon the seas when the common law rule was established. A different test must, therefore, be sought to determine the navigability of our rivers, with the consequent rights both of the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public, navigable, rivers which are navigable in fact, and as said in "The Daniel Bell," 77 U. S. 10 Wall 557 (Law Ed. 19.999), they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are, or may be conducted, in the customary modes of trade and travel on water."

Quoting from another case, the learned Justice proceeds: "We are aware that, by the common law,

of England, such streams as the Mississippi, the Missouri, the rivers Amazon and Platte; the Rhine, the Danube, the Ganges, the Nile, and the Indus were not navigable rivers, but, were the subject of private property, whilst an insignificent creek, in a small island, was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed the whole of its petty course. The Roman law, which has pervaded Continental Europe, and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so, and this common sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams some of which are a mile wide." And the question at issue (whether a grant of land, described as bordering on the Sacremento river, carried the title to the middle of the stream and included an island) was decided in the negative. The learned counsel quote freely from the opinion of the court in the case of Hardin vs. Jordan, 140 U. S. 406, in which the main question was whether United States patents to certain fractional sections of land, lying upon the borders of a small fresh water lake, or pond, in Illinois, carried the title to the middle of the lake. It was held (three of the Justices dissenting) that they did, but Mr. Justice Bradley, as the organ of the Court, in the course of the opinion handed down by him said: "This is an action * * * to recover possession of certain fractional sections of land lying on the west and south sides of a small lake, in Cook county, Illinois, situated about a dozen miles south from Chicago and two or three miles from Lake Michigan, and, also, to recover the land, under water, in front of said fractional sections, and land from which the water retires at low water. The lake is two or three miles in extent and the main question

in the cause is, whether the title of the riparian owner, on such a lake, extends to the center of the lake, or stops at the water's edge." Proceeding to consider the question thus stated, the Court found that the survey upon which the patents issued, "not only laid down meander lines, next to the lake, but also described said lines as running along the margin of the lake"; that the plat of survey exhibited the granted tracts as actually bordering upon the lake, which though marked with the words "Navigable Lake," was, in fact, but a non-navigable fresh water pond; and, that the grant was made according to said plat; and the opinion proceeds:

"Such being the form of the title granted * * *, the question is as to the effect of that title, in reference to the lake front of the lands actually described in the grant. This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois." The learned Justice then finds that "the common law is the true and only law of Illinois on the subject of land titles;" that, at common law, the question, what will pass by a grant bounded by a stream of water, depended upon the character of the stream, or water. "If it were a navigable stream, or water, the riparian proprietor extended only to high water mark. If it were a stream not navigable the rights of the riparian proprietor extended to the center of the thread of the current * * *. At common law, only arms of the sea and streams where the tide ebbs and flows are deemed navigable. To those, riparian proprietors, bounded on, or by, the river, could acquire exclusive ownership in the soil, water and fishery, to the middle thread of the current, subject, however, to the public easement of navigation." It was, then, held that the same, common law, rule applied to fresh water lakes and ponds.

Differentiating such cases, however, from these where the grant is of land on navigable, or tide water, the opinion reads, "With regard to grants of the government for lands bordering upon tide water, it has been distinctly settled that they only extend to high water mark and that the title to the shore, and land under water, in front of lands so granted, inures to the State within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State, and cannot be retained or granted out to individuals by the United States * * * *. Such title being in the State, the lands are subject to the State regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done, by leasing oyster beds in them and granting fisheries in particular localities; also, by the reclamation of submerged flats and the creation of wharves and piers and other adventitious aids to commerce."

By the express terms of the act of Congress by which Louisiana was admitted to the Union, the Mississippi river and the navigable rivers leading into the same and into the Gulf of Mexico were declared to be common highways, to be kept forever free to the inhabitants of the state and of other states and territories of the United States (Stat. at large, Vol. 2, pp. 642, 703; Boyken vs. Shaffer, 13 A. 130); and, the Civil Code provides that; "Public things are those the property of which is vested in the whole nation; of this kind are navigable rivers * * *, and the beds of rivers so long as the same are covered with water." C. C. 453.

Hence, there can be no such thing, in this state, as private ownership of the bed of a navigable river, and, a fortiori, can there be no such thing as private ownership of the bed of the sea or of an arm of the sea. In a case decided many years ago, this Court (referring to certain land lying beneath the waters of Lake Pontchartrain and claimed by the plaintiff) said: "It appears to us that the testimony shows, fully, the ground in question lies much below high water mark and forms part of the bed of the lake, and is not, there fore, susceptible to private ownership." Milne vs. Girodeau, 12 La. 325.

And, to the same effect, was the decision in Zeller vs. Yacht Club, 34 A. 837. It has, moreover, been held by this Court that the sale, at a fixed price, per acre, of fractional sections of swamp or overflowed land, bordering upon shallow, non-navigable, lakes entitled the purchaser to the number of acres that he buys, and pays for, and conveys no right to the submerged land, not thus accounted for.

McDade vs. Bossier Levee Board, 109 La. 625; Hall vs. Board, etc., 111 La., 913.

We conclude, then that, the grants under which plaintiff claims—being of land bordering upon, and partially surrounded by, the tide water of the Gulf of Mexico—carry its titles no farther than high water mark, and that, in so far as it (plaintiff) asserts ownership and possession, under such titles, of land lying beneath the waters which surround the tracts of dry land included in said grants, or, lying beneath any navigable passes, or channels which, intersect such tracts or separate them from each other, the exception, of no cause of action, was properly maintained. It does not follow, however, that the petition, taken as a whole, fails to disclose a cause of action, since, its allega-

tions are broad enough to import a charge of trespass with respect to the dry, as well as the submerged land, and, though the charge is not as specific as the defendants have a right to require, and the trial judge to order, it can not, properly, be said that it does not show a cause of action. Moreover, it seems not unlikely that there may be non-navigable streams, pools, ponds and wet places, so insignificant in dimensions and so within the borders of the dry land covered by plaintiff's grants as that plaintiff would be entitled to hold them, as included therein, (See Burns vs. Crescent, etc., Club, 116 La. 1038), and, yet, with respect to which, defendants may entertain a different opinion and may hereafter insist that the judgment appealed from constitutes res judicata.

We think, therefore, that plaintiff should be again afforded an opportunity to amend its petition (within a delay to be fixed by the judge a quo), by setting forth, specificially, the particular places, or portions of its property, upon which the alleged trespass has been committed, together with the time and manner of the trespass.

As the case is presented, the location of Creole Pass is a matter of guess work, and we are not informed, even by an allegation, whether either of the passes mentioned in the petition is navigable or otherwise. It is, therefore, ordered, adjudged and decreed that the judgment appealed from be set aside, and that this case be remanded to the district court, to be there proceeded with in accordance with the views expressed in this opinion, the costs of the appeal to be paid by defendants and those of the district court to await the final judgment."

This statement of fact would not be complete, without calling your Honors' attention to the fact that here, therefore,

was an opportunity offered to the plaintiff, to try out its right to the other many allegations in its petition, on which a cause of action might be said to be based, such as its alleged troubles with its Steamboat "Carrie." In our opinion it was the duty of the plaintiff to have tried out its case on this remanding, and then to have come back to the Supreme Court, and eventually to the Supreme Court of the United States. In place of doing this, and because the Supreme Court of Louisiana, had decided that according to the laws of Louisiana, plaintiff's title to fractional sections of land, bought according to a price of a certain number of cents per acre, did not include the remaining area of such sections, when such remaining area represented the bottoms of navigable waters, plaintiff sued out this writ of error to this Honorable Court, on the theory that there was a Federal uestion involved, and by his pleadings, subsequently made, did in our opinion, frankly admit that the issue made by the defendants by their exceptions of no cause of action, was the one and in fact, the only issue of importance in the case, as will be seen by the following admission and comment, made by the plaintiff itself, to-wit:

(1) In the second numbered paragraph of its petition for a rehearing, addressed to the Supreme Court of Louisiana, (trans. p. 61), Petitioner says:

> *"That the judgment already rendered disposes finally of the cause as to the paramount issue and interest of plaintiff, etc."*

(2.) In the nineteenth numbered paragraph of the said petition for a rehearing, where it makes referenc to the judgment of the Supreme Court of Louisiana, permitting it, (plaintiff) to again amend its petition,

19. *"as plaintiff is morally and conscientiously satisfied that it is incapable of amending on the lines proposed."*

(3.) In its assignment of errors, (trans. p. 69), Plaintiff, in commenting on the decision of the Supreme Court of Louisiana, uses the following language:

"That the said judgment is final in allowing plaintiff no alternative but to give up its case and titles in conformity with the decree."

Notwithstanding the fact therefore, that the Supreme Court of Louisiana did not disturb the said plaintiff's right to possession of a single acre of the 6,809 acres, to which it claimed title, and notwithstanding the fact that the Supreme Court only held that plaintiff in the case, with the evidence offered, could not claim title to and ownership of, the bottoms of the navigable waters, which it alleged it had title to, plaintiff took this writ of error to the Supreme Court of the United States, thus clearly and decisively emphasizing that that issue shown, was the only issue which we need to argue in the presentation of the merits of this suit to your Honors, and your Honors will therefore understand why we will confine ourselves to a discussion of this phase of the case.

ARGUMENT.

In the first place, we respectfully submit that there is no Federal question involved in this case, and that the Supreme Court of the United States has no jurisdiction to review the decision of the Supreme Court of the State of Louisiana, on a purely local question, of enforcing the laws of Louisiana, in a suit involving lands situated in Louisiana, and that therefore, your Honors should refuse to consider the case, holding that

the decision of the Supreme Court of Louisiana, the court of last resort in that state, was final.

But in the event that your Honors should not concur with us, in that view, we respectfully submit the following argument, on the merits of the issues involved, which we would propose to sub-divide in the following headings, for convenience in discussion, as each of the propositions advanced in the various sub-divisions, affect the final conclusions to be reached in a consideration of this case, and are determinative of these issues, to-wit:

I.

The issues in this case, must be decided by the laws of Louisiana.

II.

The State of Louisiana, is the owner of the bottoms of the navigable water of the State, having acquired her title thereto, by virtue of her inherent sovereignty as a State.

III.

In the creation of the State of Louisiana, the United States of America, did not reserve to itself, the navigable water botoms of the State of Louisiana.

IV.

The Congress of the United States, in the swamp land grants of 1849 and 1850, gave to the State of Louisiana, certainly no more than the United States had reserved to itself, at the time the State of Louisiana was created.

V.

In Louisiana, the seashore is public, and the waters of the sea are public, and the maps on file in this record, show this locality to be the seashore, and the sea.

VI.

According to the laws of Louisiana, the botoms of all navigable waters are public and the title thereto vests in the State.

VII.

According to the laws of Louisiana, those water bottoms within the State, where oysters grow naturally, are known as Natural Oyster Reefs, and have always been reserved from private ownership, for the benefit of the general public of the State.

VIII.

Act 106 of the Legislature of the State of Louisiana, for the year 1886, to which plaintiff refers, as the basis of its contract right, specifically provided that waters and water bottoms, producing oysters naturally, were reserved from private ownership, for the benefit of the State, and were held as public property.

IX.

The swamp land grant acts of congress, of 1849 and 1850, granted to the State of Louisiana, land, and not the bottoms of navigable water.

X.

The surveys made by the United States Government, being the public surveys, fixed the rights of United States in the State of Louisiana, fixed the limits of the land, and fixed the limits of the water.

XI.

These public surveys of the United States, and the patents issued and described in accordance therewith, and the areas of land mentioned in the patents, and described in accordance with the Township Plats of survey, showed that only land had been conveyed by said patents.

XII.

Many of the patents, acquired by plaintiff's authors in title. are anterior to the adoption by the Legislature of the State of Louisiana, of Act 106 of 1886, and therefore, these lands must have been patented without any relation to said legislative act, and other of the patents of plaintiff's authors in title, were issued subsequent to the repeal of said Act 106 of 1886, and therefore, must have been issued without any relation to said Legislative act.

XIII.

That, even if any of the patents forming the basis of title of plaintiff's authors in title, were obtained at a time when Act 106 of 1886 was in effect, the right granted by this Act 106 of 1886, was merely a privilege, and appertains only to the *planting* of oysters, and did not appertain to the harvesting of the crops of oysters growing naturally, and was a privilege

that the Legislature had a right at any time to revoke, and did not form the basis of any contract.

XIV.

The privileges granted by Section 2 of Act 106 of the Legislature of the State of Louisiana for 1886, were repealed by Act 110, of the Legislature of the State of Louisiana, for the year 1892.

XV.

In accordance with the jurisprudence of the State of Louisiana, a purchaser of lands from the State, gets only in acres what he buys and pays for per acre.

XVI.

The laws and jurisprudence of the State of Louisiana, do not recognize, as may be the case in the common law states, that a purchaser of a fractional section of land, at a stated rate per acre, gets as a bonus, navigable water botoms, included within the limits of the remainder of his fractional sections.

XVII.

The State of Lousiana is vested with full power and authority to control her navigable water and to use the same, according to such laws as she may enact, for the purpose of oyster culture and the development of the oyster industry, within the limits of sad state.

XVIII.

The State of Lousiana, has for a number of years, been regulating the oyster industry in her navigable waters, and has

evolved a comprehensive and effective system of laws for its development, and is entitled in the fostering and development of that industry, to enforce its code of laws.

As each one of the propositions which we have evolved, in some way, affects the issues presented to your Honors for consideration, we will now discuss these propositions, we have thus enumerated, and submit our authorities in support of each one of the propositions which we have advanced.

I.

"The issues in this case, must be decided by the laws of Louisiana."

In the case of *Hardin vs. Jordan,* 140 U. S. 371, in which it was claimed that a patent to land bordering on, an inland lake, carried with it, title to land underneath the water, as far as the outer line of the section patented, the court held:

> "In regard to the grants of the government for lands bordering on tide-water, it has been distinctly stated that this only extended to high-water mark, and that the title to the shore and lands under water in front of the lands so granted insures to the State within which they are situated, if a State has been organized and established there. *Such title being in the State, the lands are subject to state regulations and control, under the* conditions however, of not interfering with the regulation which may be made by the Government, with regard to public navigation and commerce." (Italics ours.)

In the case of *Shively* vs. *Bowlby,* 152 U. S. 341, the Court, after considering the laws of the various States on this subject, said:

> "The foregoing summary of the laws of the original States shows that there is no universal and uni-

> form law, upon the subject, *but that each state has dealt with the lands under the tide-waters within its border, according to its own views of justice and policy,* reserving its own control over such lands, and granting rights therein, to individuals or corporations, whether owners of the adjoining up-lands or not, as it considered for the best interest of the public." (Italics ours.)

In *Packer* vs. *Bird,* 137 U. S. 662, the Court used the following language:

> "The Courts of the United States will construe the grants of the general government, without reference to the rules of construction, adopted by the States for their grants, *but whatever incidents or rights, attached to the ownership of property, conveyed by the Government will be determined by the States* subject to the condition that their rules do not impair the efficiency of the grant or the use and enjoyment of the property, by the grantee. *As an incident of such ownership, the right of the riparian proprietor, where the waters are above the influence of the tide, should be limited according to the law of the state,* either low or high water mark, or will extend to the middle of the stream." (Italics ours.)

In the case of Hardin vs. Jordan, 140 U. S. 406, already referred to, your Honors, deciding the issues involved, held that the issues involved must be decided according to the laws of the State within which the lands were situated, in that instance it being the State of Illinois, and your Honors then found, that in Illinois, the law prevailing, was the common law, and you thereupon held that land owners in that instance, got certain rights to the water bottoms, of a non-navigable lake, because the common law gave such land owners such rights, but you distinctly recognized in your decision, the

proposition which we have advanced under this heading of our discussion, that the issues must be determined by the laws of the State, within which the land is situated, and we therefore submit that we have thus clearly demonstrated the fact, that the issues in this case, must be determined by the laws of the State of Louisiana.

II.

"The State of Louisiana, is the owner of the bottoms of the navigable water of the State, having acquired her title thereto, by virtue of her inherent sovereignty as a State."

The law under which the State of Louisiana, claims to own the waters and navigable water bottoms of said State, is the Law of Nations; this law provides that a sovereign state, (which Louisiana is) owns the water and water bottoms, and all that is in, or on, these bottoms, and has absolute control and ownership of the same, for the distance of one marine league out to sea, measured from low water mark, on the shore. This line, one marine league from the low water mark, folows the general meander of the shore line, and does not enter into lakes, bays, estuaries, gulfs, or arms of the sea, unless such bodies have a mouth or communicating channel connecting them with the sea, of a greater width than two marine leagues. This last, is not the condition of affairs, at the points in question in this action. The maps filed by the plaintiff show, that the channels, connecting Creole Gap and Grand Pass, with the Gulf of Mexico, Lake Borgne and Mississippi Sound, are much less than two marine leages in width, and therefore, the line follows the general meander of the shore line at these points.

The proposition that tide-waters, no matter what their depth, and navigable waters, whether the tide ebbs and flows in them or not, and beds of these waters and soils under them, belong to the State by virtue of her sovereignty, and not by donation, or cession from the United States, is supported by the following authorities:

> "Martin vs. Waddell, 16 Peters, 367; Den vs. Jersey Co. 15 How. 426; Rundle vs. Delaware & R. Canal Co., 14 How. 80; Smith vs. Maryland, 18 How. 71; Pollard vs. Hagan, 35 How. 212; United States vs. Pacheco, 2 Wall. 587; Mumford vs. Wardell, 6 Wall. 423; Wever vs. State Harbor Commrs., 18 Wall, 57; Packer vs. Bird, 137 U. S. 661; San Francisco vs. Le Roy, 138 U. S. 656; Knight vs. United Land Association, 142 U. S. 141; Barney vs. Keokuk, 94 U. S. 324; Hardin vs. Jordan, 140 U. S. 371; Ill. Cen. R. R. Co., vs. Illinois, 146, U. S. 387; Shively vs. Bowlby, 152 U. S. 1; Morris vs. United States, 174 U. S. 194.

It is a fact, that the State of Louisiana, holds title to her land, under one title, viz: Donation from the Congress of the United States; and she holds title to her waters, under another, viz: by virtue of her sovereignty; the objects and purposes for which she holds land, and the objects and purposes for which she holds waters, are as widely separate and distinct, as her title; the lands are held by her, only to be sold and disposed of to individuals, for the purpose of being cultivated, improved, made into homes for her citizens, whereby her wealth and population may be increased and whereby citizens may be bred, and reared to support and defend her; the waters are held by her, in trust for all her citizens, to be used by them, for purposes of navigation, transportation, commerce and

fisheries, all and at all times, under her complete administration, supervision and control.

Accordingly, her policy has always been to sell her lands, and have them reduced to individual and exclusive ownership, on the most liberal terms, and as fast as possible, and her land laws are to this effect. On the other hand, it has never entered the minds of any of her people, that she should sell and dispose of her water, and no laws have ever been passed, which authorized any of her officers or agents to dispose of any such.

The Acts of 1853 and 1862 of the Legislature of Louisiana, authorizing the sale (under strict regulations), of the bottoms of shallow lakes, were predicted entirely upon the hypothesis that these bottoms were, in truth and fact, land, susceptible of agricultural cultivation.

It is urged by us, that the areas claimed by plaintiff in this proceeding, are those of navigable water bottoms, near the shore of the sea. They are therefore necessarily water bottoms, affected by the tide. That they are navigable water bottoms is demonstrated by the fact that Plaintiff alleges that its Steam boat "Carrie" navigates these waters.

Under the common law of England, all waters were deemed navigable, which were subject to the ebb and flow of the tide; but in the case of the *Genesee Chief,* 12 How. p. 443, it was held by your Honors, that the question of the navigability of waters in this country, was not to be tested or determined by the rules in England, but that the navigability of the water, depended entirely on its navigable character, but it was therein held, that all of the waters of the coast, subject to the ebb and flow of the tide, were under the jurisdiction of the admiralty courts of the United States, and were public waters. In the case of *Sapp* vs. *Frazier* et al., 51 An. p. 1718, the

Supreme Court of the State of Louisiana, held that Lake Bistenau was a navigable body of water, although not navigable throughout the year. It was shown in that case, that the bed of the lake is covered by water from six to seven months of the year, and for five or six months—beginning in the summer and extending through the Autumn season—the greater part of this bed is uncovered, and that during this low water season there is a channel which meanders through the bed of the lake, by which the surplus waters of the lake are carried off, and that sometimes there is a current in this channel and that sometimes there is not, and that steamboats navigate the lake, during January and February, and throughout the spring months, until the early summer.

In the case of *Martin vs. Waddell,* 16 Peters, p. 410, your Honors, in speaking of what constituted the navigability of a river, declared that if it be capable in its natural state of being used for purposes of commerce, no matter in what mode the same is conducted, it is navigable in fact, and becomes a public river or highway.

An examination of the authorities cited clearly convinces us that the beds of all of the navigable waters of the State of Louisiana, and all the tide waters forming part of it, or connecting with the Gulf of Mexico, belong to the State of Louisiana, not by grant from the general Government, but by virtue of her sovereignty and as never having been the property of the Government of the United States.

In the case of *Martin vs. Waddell,* 16 Peters, p. 410, your Honors held that the State had the absolute ownership by right of sovereignty of all tide waters and all navigable waters within their borders, and your Honors further state:

> "When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters, and the soils under them, for their common use, subject only to the rights since surrendered under the Constitution of the United States."

In the case of *Barney vs. Keokuk*, 94 U. S., p. 338, it was held by your Honors, that "the soil of navigable waters belong to the States by their inherent sovereignty," and that "the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water," and your Honors cited in support thereof *Pollard's Lessee vs. Hagan*, 3 Howard p. 212, and *Goodtitle vs. Kibbe*, 9, *Howard*, p. 471.

In the case of *Barney* vs. *Keokuk*, it was declared that all navigable waters in the State, whether tide waters, and, therefore regarded as navigable *per se* under the English rule, or whether called navigable, or deemed so, are *"navigable,"* and to be treated as such, and that the soil or beds of such waters are the property of the State by right of sovereignty and eminent domain. See also in this connection *Withers* vs. *Buckley*, 20 Howard, p. 84, and *Illinois Central Railroad Company*, vs. *State of Illinois*, 146 U. S., p. 387.

In the case of *Shively* vs. *Bowlby*, 152 U. S. pp. 56, et seq. your Honors went into this question most exhaustively, and in that well considered, and deeply studied opinion, the Court has embodied all of the authority of the law, and held unequivocally and in the most positive terms, that all tide waters and all navigable waters and their beds belong to the several States in the Union by virtue of their sovereignty. In that opinion the Court states:

> "That they never belonged to the United States, but were only held by it in trust for the several States to be ultimately created out of the territory."

And on page 26, of the same volume, the Court declares, that:

> "The new States admitted into the Union since the adoption of the Constitution, have the same rights as the original States in the tide waters and in the lands below the high-water mark within their respective jurisdictions."

We especially beg the Court to note that in this case of *Shively* vs. *Bowlby* the Court was dealing exclusively with rights claimed in tide waters, and in the case at bar, there is no denial of the fact that the waters of Grand Pass and Creole Gap, are tide waters, and that the tide rises and falls therein, and that the same are salt waters connecting with the Gulf of Mexico.

In *Pollard* vs. *Hagan*, 3 Howard, p. 212, your Honors declared that upon the admittance of the State of Alabama into the Union, the title of the lands below high-water mark, became the property of the State and could not afterwards be disposed of by Congress. In that case the Court used the following language:

> "We think a proper examination of this subject will show, that the United States never held any municipal sovereignty or jurisdiction, or right of soil, in or to the territory in which Alabama or or any of the new States were framed, except for temporary purposes, and to execute the trust created by the Acts of the Virginia and Georgia Legislature, and trusts creat-

ed by the treaty with the French Republic of April 20th, 1803, ceding Louisiana."

And the Court says in that case:

> "When the United States accepted the cession of the territory they took upon themselves to hold the municipal eminent domain for the new States and invest them with it to the same extent, and in all respects, that it was held by the States ceding the territory."

In Knight vs. United States Land Association, 142 U. S., p. 183, your Honors state:

> "It is the set rule of law in this Court, that absolute title in, and dominion sovereignty over, the soils under the tide waters in the original States, were reserved for the several states, and that the new States since admitted, have the same rights, sovereignty and jurisdiction in that behalf, as the original States possess within their respective borders. Upon the acquisition of territory from Mexico they acquired the title to tide lands equal to the title of uplands, but in respect to the former, they held it in trust only for new States that might be erected out of such territory."

In *Mann* vs. *Tacoma Land Company*, 153 U. S., p. 284, your Honors affirmed the doctrine laid down in *Shively* vs. *Bowlby*, and further decisions of the Court, in respect that the title of tide lands, and water of that character, is in the States, and that the United States had no power to grant the title to individuals, and declared it had been settled that the general legislation of Congress regarding public lands, does not extend to tide lands, because, as stated in *Newhall* vs. *Sanger*, 92 U. S., p. 761, the words "public lands" are habitually used

in our legislation to describe such as are subject to sale or other disposal, under general laws.

We therefore hold that while Louisiana belonged to France, all of the navigable waters and their beds, and all of the tide waters and the beds covered by tide waters, belonged to the crown of France; that when the monarchy was abolished and the French Republic was organized, these waters and their beds belonged to the French Republic in its sovereign capacity; that when by treaty of April 30, 1803, Louisiana was ceded by the French Republic to the United States, the United States took control of these waters, and their beds, and held them in trust for the new States to be created out of the said Louisiana territory. We further hold that it is demonstrated that when in 1812, the Congress of the United States, in pursuance of the terms of the treaty with France, admitted Louisiana into the Union, that she thereby became, by virtue of her sovereignty, vested with the absolute ownership of all the navigable waters in the State, and all of the tide waters in the State, and the beds thereof. All of the lands in the State which were granted to private individuals, or corporations, remained the property of these private individuals, or corporations, but the United States remained in full, complete and perfect ownership of all the public swamp and overflowed lands of the State which had never been alienated or granted away by the crown of France or Spain, or which had not been alienated by the United States herself during the existence of the territorial form of government. The waters, however, and the beds of strams, bays and lakes became instantly vested in the State of Louisiana.

Mr. Gould, in his great work ("Gould on Waters") tells us, on page 34:

"The rightts of the Crown in tide waters are classed among tthe *regalia,* or prerogative right, to treasure trove, tto wreck, and privilege of appointing ports and havenas. Such privileges are accorded to the King by the common law, as incident to the powers of Government, forr the protection of the realm, the regulation of the maarine revenues, and in the interest of commerce. Acccording to the treatise *De Jure Maris,* commonly ascrilbed to Lord Hale, and other authorities of the Seventeemth Century, which refer to early precedents, the Crown's interest in navigable waters is of two-fold nature: first, the *jus publicum,* a right of jurisdiction and control for the benefit of its subjects, which is similair to the jurisdiction over public highways by land, tthough the right of soil may be in the owners of the adjoining estates, and for the protection of which the King, as the head of the realm, may interpose when the rights of the public are impaired; second, the *jus privatum,* and which cannot be used by the Crown or conveyed to a subject discharged of his public trust, or so as to justify any interference with the public rights of navigation and fishery."

And on page 72, he tells us:

"At the time of the Revolution, when the people became Sovereign, the respective States succeeded to the title of the Crown in the tide waters within their territorial limits, and to such rights therein as had been previously granted to the local Governments established under the Royal sanction. Public rights in navigable waters were not affected or impaired by this change of title, and the powers acquired by the State were those which, in England, and in this country previous to the Revolution, could have been exercised by the King alone, or by him in conjunction with Parlia-

ment. It is apparent that the principles of the English law upon the subject have been much modified in this country. While in England there are rights of private property and of jurisdiction in the Crown, the public rights of navigation and fishery, which the Crown cannot impair, and the power of Parliament to regulate these public interests, there are here no rights but those of the public, on the one hand, and of individuals on the other. For this purpose, the State represents the people in their united sovereignty."

It is therefore evident, that these navigable water bottoms in dispute in this case, belong to the State of Louisiana, by virtue of her inherent sovereignty, and were not conveyed by the United States, to the State of Louisiana, under the swamp land grants of 1849 and 1850, and therefore, not having been included in the swamp land grants, it is demonstrated that they could not have been included in the selections and approval of lands under these Acts nor in the patents by the State of Louisiana, which were supposed to include lands which had been acquired by the State of Louisiana, from the United States, under the swamp land grants of 1849 and 1850.

III.

"In the creation of the State of Louisiana, the United States of America, did not reserve to itself, the navigable water bottoms of the State of Louisiana."

Having shown that the navigable water bottoms herein litigated about, belong to the State of Louisiana, by virtue of her inherent sovereignty, and therefore, were not acquired by the State of Louisiana, from the United States, under the swamp land grants of 1849 and 1850 we would now propose

to show, that these navigable water bottoms, could not have been conveyed by the United States to the State of Louisiana, under the swamp land grants of 1849 and 1850, for still another reason, and that is, that they had never been reserved, by the United States, at the time of the creation of the State of Louisiana, and therefore, did not for that reason belong to the United States, to be conveyed to the State, through the swamp land grants of 1849 and 1850.

On Feb. 11th, 1811, there was approved an act of Congress," providing the conditions upon which Louisiana might be admitted into the Union."

This act, provides, among other things:

> "That the said convention, shall provide by an ordinance, irrevocable without the consent of the United States, that the people inhabiting said territory, agreed and declared that they forever disclaimed all right and title to the *waste and unappropriated lands*, lying within said territory; and that the same should be and remain at the sole and entire disposition of the United States." (Italics ours.)

There is no reservation of the waters around these lands on the seashore, nor of the bottoms of the said waters, and for a very good reason. The man who drew and the men who adopted, that act, knew that, if Louisiana was created into a sovereign state, she would, *ipso facto*, become the owner of these waters and bottoms on the seashore, under the law of Nations, and that the United States could not reserve these waters and bottoms and at the same time create a sovereign state, within whose territory, they would be.

The convention complied with the condition specified in the act of Congress, and Louisiana became a sovereign state,

its constitution being ratified and approved, and the state formally admitted into the Union, by an act of Congress, approved April 8, 1812.

From the above, it is apparent, that it was *land* and not *water*, nor navigable water bottoms, that the United States reserved to herself, within the limits of the Territory of Orleans, at the time the State of Louisiana, was created, and for that reason, she did not have title to these navigable water bottoms, which would have enabled her to donate the same to the State of Louisiana under the swamp land grants of 1849 and 1850.

IV.

> *"The Congress of the United States, in the swamp land grants of 1849 and 1850, gave to the State of Louisiana, certainly no more than the United States had reserved to itself, at the time the State of Louisiana was created."*

It is evident that, under the swamp land grants of 1849 and 1850, of the Congress of the United States, the United States could not grant to the State of Louisiana, anything more than the United States itself owned. It has been demonstrated that the United States, at the time it created Louisiana, into a state, reserved to itself the waste and unappropriated *land*, and did not reserve to itself, any of the water. It has also been clearly demonstrated, that these navigable water bottoms, already belonged to the State of Louisiana, by virtue of her inherent sovereignty, and it therefore follows as a demonstration, that the United States could not convey them, to the State of Louisiana, under the swamp land grants of 1849 and 1850.

V.

"In Louisiana the seashore is public, and the waters of the sea are public, and the map on file in this record, shows this locality to be the seashore, and the sea."

As is well known, Louisiana is not governed by the common law of the country. It is governed by the Civil Law, as embodied in its Civil Code, and by its statutory law. The maps appearing in the record show that the locality in question, is the seashore. The Pass between Cat Island and Isle a Pitre, extends from Mississippi Sound into the Gulf of Mexico. The Grand Pass, at the Southwestern end of Isle a Pitre, connects the waters of Mississippi Sound with those of the Gulf of Mexico. Our Supreme Court has even held that Lake Ponchartrain, which is much further inland, is an arm of the sea, and therefore, the waters of Mississippi Sound and Chandeleur Sound, are necessarily arms of the sea.

(See Zeller vs. Yacht Club, 34 La. An. p. 838.)

The provisions of the Civil Code of Louisiana on this subject, of public things are as follows:

"Civil Code, Art. 450. Things, which are common, are those the ownership of which belongs to nobody in particular, and which all men may freely use, conformably with the use for which nature has intended them; such as air, running water, the sea and its shores.

"Art. 451. Sea shore is that space of land, over which the waters of the sea spread in the highest water, during the winter season.

"Art. 452. From the public use of the sea shores, it follows that every one has a right to build cabins thereon for shelter, and likewise to land there, either

to fish or shelter himself from the storm, to moor ships, to dry nets, and the like, provided no damage arise from the same to the buidlings and erections made by the owners of the adjoining property.

"Art. 453. Public things are those, the property of which is vested in the whole nation, and the use of which is allowed to all the members of the nation; of this kind are navigable rivers, seaports, roadsteads and harbors, highways and the beds of rivers, as long as the same are covered with water. Hence it follows that every man has a right freely to fish in the rivers, ports, roadsteads, and harbors."

It follows from this statement of the Law that the pretension of Plaintiff that it got title to these water bottoms under Louisiana patent, is unfounded.

VI.

"According to the laws of Louisiana, the bottoms of all navigable waters are public and the title thereto vests in the State."

The correctness of this proposition, is established by the provisions of Art. 453 of Our Civil Code, to which reference has just been made. The jurisprudence of the State has also established the fact that navigable water bottoms of Louisiana, are the property of the public.

In the case of Zeller vs. Yacht Club, 34 La. An. 837, already referred to, the Supreme Court of the State of Louisiana, lays down the proposition: "That modes or ways of the acquisition of property are limited to those expressly prescribed by law, and cannot be extended by implication. The only ways in which a riparian proprietor acquires title to any part of a bed or shore of a body of water, are those laid down by the

Code of Louisiana; viz: by alluvion, accession or reliction. None of which conditions exist in this case."

Our own Supreme Court of Louisiana, in the instant case, held as follows, as already quoted:

> "There can be no such thing, in this State, as private ownership of the bed of a navigable river, and a fortiori, can there be no such thing as private ownership of the sea, or arm of the sea. In a case decided many years ago, this court, (referring to certain land, lying beneath the waters of Lake Ponchartrain, claimed by the Plaintiff) said: "It appears to us that the testimony shows, fully, the ground in question lies much below high water mark, and forms part of the bed of the lake, and is not, therefore, susceptible to private ownership."

(*Milne vs. Zirodeau*, 12 La. 325.)

In the case of Sapp vs. Fraier, 51 La. An. 1718, the plaintiff, owning land bordering on Lake Bistineau, an inland lake in North Louisiana, claimed title as a riparian proprietor to the center of the lake, or to the low water channel, by right of accretion or accession. The Court held: "There has been no increase of land, whether by alluvion or dereliction, between the tract acquired by plaintiff and the lake, since the date of his purchase, and there was none before. Therefore, under the law of Louisiana, there has been nothing for him to take, even giving him all the pretensions he asserts as riparian proprietor."

These authorities clearly establish the fact, that it could not be held that these navigable water bodies were included in patent by the State of Louisiana, to the ancestors of petitioners or plaintiff's title, for the reason that the laws of Louisiana,

regards these navigable water bottoms, as reserved for the benefit of the public, and therefore, could not be legally included in such a sale.

VII.

"According to the laws of Louisiana, those water bottoms within the State, where oysters grow naturally, are known as Natural Oyster Reefs, and have always been reserved from private ownership, for the benefit of the general public of the State."

The real reason prompting the plaintiff, in the bringing of this suit, is the hope of obtaining control exclusively, of the natural oyster product, of the navigable water bottoms, bordering on this land, which land it purchased from the State of Louisiana. We have stated already, as an additional reason, for reaching the conclusion that its patents to the land, did not give it any right to the oysters on these navigable water bottoms, the fact shown by the policy of the State of Louisiana, towards these natural oyster reefs, or natural producing water bottoms, that the State retained them for the benefit of the public as shown by the statutory law of Louisiana.

The first comprehensive oyster law, shown by the statutory law of Louisiana, is Act 106, of 1886 of the Legislature of that state. This was followed by other Legislation, and we will quote from this Legislation, those sections of the oyster laws which show the policy of the state, towards the natural oyster reefs, and water bottoms.

Section 1, of Act 106 of 1886, page 195, contains the following clause:

"And no grant or sale, or conveyance, shall hereafter be madee by the Register of the State Land office, to any estate, or interest of the State in any natural oyster bed or shoal, whether the said bed or shoal shall ebb bare or not."

Section 1, of Act 110 of 1892, page 143, contains the following clause:

"And no grant or sale or conveyance, shall hereafter be made by the Register of the State Land Office to any estate, or interest of the State, in any natural oyster bed or shoal, whether the said bed or shoal shall ebb bare or not; and the citizens, of this State, shall have the exclusive privilege to fish or take oysters in any natural oyster bed or shoal, subject to the restrictions hereinafter imposed.'

Section 1, of Act 121 of 1896, page 170, contains the following clause:

"And no grant or sale or conveyance, shall hereafter be made by the Register of the State Land Office to any estate, or interests of the State, in any natural oyster bed or shoal, whether the said bed or shoal shall ebb bare or not; and the citizens of this state shall have the exclusive privilege to fish or take oysters in any natural oyster bed or shoal subject to the restrictions hereinafter imposed."

Section 1, of Act 153 of 1902, page 275, contains the following clause:

"That all of the beds of the rivers, bayous, creeks, lagoons, lakes, bays, coves, sounds and inlets bordering on or connecting with the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of

> the State of Louisiana shall be, continue, and remain the property of the State of Louisiana, and may be used as a common by all the residents of the State of Louisiana and Louisiana corporations, for the purposes of fishing, taking, catching, bedding and raising oysters and other shell fish, subject to the reservations and restrictions, hereinafter to be imposed by this Act and by the Oyster Commission of Louisiana hereinafter created. No grant, sale or conveyance of the lands forming the bottoms or beds of any of said bodies or streams of water, except the conditional leases and dispositions hereinafter provided for, shall hereafter be made by the Register of the State Land Office or by any other official, corporation or person. Nor shall any natural oyster bed or reef, whether same shall ebb bare or not, ever be sold by the State, or by any official, or by any political corporation or sub-division of said State."

Section 1, of Act 52, of the Legislature of Louisiana, for the year 1904, contains the following clause:

> "That all the beds and bottoms of the rivers, bayous, lagoons, lakes, bays, sounds and inlets, bordering on or connecting with the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of the State of Louisiana, and all oysters and other shell fish naturally growing thereon shall be, continue and remain, the property of the State of Louisiana, and shall be under the control of the Oyster Commission of Louisiana, hereinafter created, which said Commission may permit of its use by residents of the State of Louisiana firms, composed of residents of Louisiana, and Louisiana corporations, for the purpose of fishing, taking, catching, bedding and raising oysters and other shell fish, subject to the reservations and restrictions

hereinafter to be imposed by this act, or hereafter to be imposed by said Oyster Commission of Louisiana. No grant, sale or conveyance of the lands forming the bottoms or beds of said bodies or streams of water, except the conditional leases and dispositions hereinafter provided for, shall hereafter be made by the Register of the State Land Office, or by any other official, political corporation or person."

Section 1, of Act 189 of the Louisiana Legislature for the year 1910, contains the following clause:

"That all beds and bottoms of rivers, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico, and that part of the Gulf of Mexico, within the jurisdiction of the State of Louisiana, including all natural oyster reefs, and all oyster and other shell fish growing thereon shall be, continue and remain the property of the State of Louisiana, except as otherwise provided, and shall be under the exclusive control of the Board of Commissioners for the Protection of Birds, Game and Fish. The Board may permit the use of the said bottoms and reefs for the purpose of fishing, taking, bedding and raising oysters and other shell fish, subject to the restrictions imposed by law, and the regulations of said Board, in so far as they do not conflict with the laws of the State.

No grant, sale or conveyance of the lands forming the bottoms of said bodies or streams of water, shall hereafter be made by the Register of the State Land Office, by any other official or by any subordinate political corporation."

These extracts from various Legislative Acts of the State of Louisiana, clearly demonstrate that Louisiana has been in-

telligently and comprehensively controlling her oyster industry in the waters of that State, that the bottoms of these waters and the natural oysters growing thereon, have always been declared to be the property of the State, subject only, to such rights of property as individuals may therein acquire, under the laws of the State of Louisiana.

As opposed to this, the Petitioner, is endeavoring to claim title to these navigable water bottoms, and consequent title to the product of these navigable water bottoms, as part of the property rights acquired when he bought certain lands above water, in the State of Louisiana. All of which is thus seen to be clearly contrary to the Laws of Louisiana.

VIII.

> *"Act 106 of the Legislature of the State of Louisiana, for the year 1886, to which plaintiff refers, as the basis of its contract right, specifically provided that waters and water bottoms producing oysters naturally, were reserved from private ownership, for the benefit of the State, and were held as public property."*

As we have already explained, the bone of contention in this litigation, is the right to the oysters growing naturally, on the navigable water bottoms, which plaintiff alleges are within the limits of its lawful survey, and therefore, its personal private property. As contradistinguished from this, we have shown the policy of the state, towards these natural oyster producing localities, and the whole system of laws of Louisiana, is to the effect, that they are reserved to the State and the public. Plaintiff, however, as will be noted from its petition for a writ of errer, and as will be noted from its brief, lays stress on the provisions of Act 106 of the Louisiana Legisla-

ture of 1886, reference to which, we have hereinbefore made.

In place of this act, granting to the plaintiff any rights in the nature of a contract, it will be noted that the Section 1, of Act 106 of 1886 which we have just cited, sets clearly forth, the policy of the State, in which it declares that these waters that produce oysters naturally, are the property of the state. It will be noted also, that the privilege conferred by Section 2 of that Act is confined exclusively, the right of *planting* oysters and other shell fish, in such waters, as are comprised within the limits of a lawful survey, of a person occupying the adjoining property. But this section does not give that person, the right to the natural oyster product from these waters, such waters producing the natural product, being recognized as a natural oyster reef, as described in the preceding Section 1 of the Act, and plaintiff therefore, can find no support for its contention in this Act, for it prohibits, in place of grants, any rights to natural oyster reefs.

IX.

"The swamp land grant acts of Congress, of 1849 and 1850, granted to the State of Louisiana, land, and not the bottoms of navigable water."

Where the superficies of a grant of land, embraces waters valuable for navigation or fisheries, the grant does not convey these waters or their beds.

26 Cal. 336; 23 South Carolina, 50.

State laws, for the entry and sale of public lands or for the entry and sale of swamp and over flowed lands do not extend to the soil beneath, navigable waters, and no right to obstruct navigation, or interfere with fisheries, passes to purchaser under such laws.

21 Fed. Rep. 90; Gould on Waters, 88; 20 Cal. 336; 40 Cal. 471; 62 Cal. 250; 36 Fed. Rep. 665.

As the jurisdiction of the Federal Land Office, and the State Land Office, only covered public land, and as this term, as decided by the Supreme Court in *Sanger* vs. *Newhall*, 92 U. S. 761, only covers such lands as are subject to sale or other disposal under the general laws, both of these authorities would be utterly without jurisdiction over water; consequently, all acts of theirs respecting water, and undertaking to transfer the title to water, are not only voidable, but are void, and, therefore, subject to attack in any form of action by way of defense or otherwise. And this is on the supposition that title to these water bottoms was included erroneously in the patent.

Defendants do not contend for one moment, that the patents relied on by the plaintiff, do not convey all the land, which a survey of it embraces; on the contrary, they fully and freely admit that the plaintiffs own such lands as actually exists within its lawful survey; but all that they deny is, that the plaintiff acquired any title to any portion of the navigable water botoms; and what the defendants ask at the hands of the Court, is a construction of the patents and a declaration from the evidence submitted that the water claimed by the plaintiff never passed from the State, and was not included in the patents.

It is contended by the defendant that the subject matter of conveying to plaintiff title to navigable water bottoms was never within the jurisdiction of the Secretary of the Interior, or the Register of the State Land Office, and that their action in endeavoring to do this, by issuing a patent under the swamp land grant acts of Congress of the United States would be

void, because the State of Louisiana, held her title to these navigable water bottoms by virtue of her sovereignty, and not by virtue of the swamp land grant acts of Congress.

Under her laws, the United States proceeded to have surveyed in townships, ranges and sections, the lands within the State of Louisiana, and also had surveys made of all lands fronting on rivers and bayous. In 1849 Congress passed an act donating to the Sate of Louisiana, all swamp and over flowed lands, for the purpose of enabling the state to sell the same and use the proceeds of such sales to levee, drain and reclaim these lands, but especially exempted from the operation of this law, all bts surveyed as fronting on any river, bayou or stream. In 850, Congress passed another Act donating the swamp and overflowed lands in every State in the Union to the State in which same was situated, for the same purpose, and in this Act no exception was made as to surveys on streams and water ourses.

It is the contention of the defendants as already explained, that these patents did not convey any title to the navigable water bottoms in controvesy. It is the further contenion of the defendants, that these Acts of Congress did not authorize the Secretary of the Interior to classify navigable water bottoms as swamp and overflowed lands, and that if he, by error or fraud on the part of hissurveyors, by mistake issued a patent to navigable water bottms as swamp and overflowed lands, such patent would be prctically null and void, at least to the extent that it essayed to convey the title to these navigable water bottoms, because navgable water bottoms were not within the jurisdiction of this officer under the law, as determined by the definitions of the Corts of our country as to what constitutes swamp and overflowed lands.

Thee underlying factor in the determination of what passed under these Acts is the fact that the area must be land, or something convertable into land, that could be utilized in the cultivation of crops. Our courts have already decided what constitutes the subject matter.

These definitions are as follows.

> " 'Swamp and overflowed lands' as used in a complaint to compel a conveyance of certain land which the plaintiff claimed as swamp and overflowed lands purchased from the State, and which the defendants claim as a pre-emption, should be construed as merely equivalent to the phrase 'wet and unfit for cultivation.' Land which is too wet for cultivation is 'swamp and overflowed lands,' whether the water flows over or stands upon it. In this sense the adjectives 'swamp' and 'overflowed,' taken together, qualify the noun 'land' in but one particular, and express but one fact concerning it; that is, it is too wet for cultivation. Hence a traverse of the allegations of the complaint that the land was 'swamp' and 'overflowed' is sufficient, in alleging that the land is not to wet for cultivation."
>
> Miller vs. Tobin (U. S.), 18 Fed. 609, 614.
>
> " 'Swamp lands,' as used in the Act of Congress, Sept. 28th, 1850, granting swamp and overflowed lands to the States, as distinguished from 'overflowed lands,' may be considered to be such as require drainage to fit them for cultivation."
>
> San Francisco Sav. Union vs. Irwin (U. S.), 28 Fed. 708, 712.
>
> "The 'swamp and overflowed lands,' granted to the State of Iowa by Act of Congress of 1850, means lands which by reason of swamp or overflow became unfit for cultivation."

Merrill vs. Tobin (U. S.), 30 Fed. 738, 739.

"'Swamp and overflowed lands,' within Act of Congress, March 7th, 1857, confirming to the several States the swamp and overflowed lands, are lands on which after the subsidence of the waters, grain or other staple crops cannot be raised."

Keeran vs. Allen, 33 Cal. 542, 546.

"Land which is not susceptible of cultivation in grain or other staple products by reason of overflow, is 'swamp and overflowed lands,' within the meaning of Act of Congress, Sept. 28, 1850, relating to the granting of swamp and overflowed lands; and the fact that a crop of grass may spring up after the overflow subsides does not prevent it from being swamp and overflowed."

Keeran vs. Griffith, 31 Cal. 461, 462, 466.

"'Swamp and overflowed lands' are lands rendered unfit for successful cultivation by reason of the overflow. If lands by reason of the overflow were generally rendered unfit for the successful cultivation of the staple crops, they are swamp and overflowed lands within the meaning of the Act. The fact that staple productions such as potatoes, corn, barley or buckwheat may be cultivated and raised on the land is not all that is required; but such productions, or some of them, must be usually cultivated successfully.'

Thompson vs. Thornton, 50 Cal. 142, 144.

"'Swamp and overflowed lands,' as used in an Act of Congress granting to the State of California swamp and overflowed lands, made thereby unfit for cultivation, includes only such legal subdivision according to the congressional system of surveys, the greater part of which was swamp and overflowed, and unless a tract contained the greater part of a legal subdivision,

according to such systems of surveys, they do not come within the provisions of the statute.'

Hogaboom vs. Ehrhardt, 58 Cal. 231, 233.

" 'Overflowed lands,' as used in Act of Congress, Sept. 28, 1850, granting swamp and overflowed lands to the States, mean 'those lands which are subject to such periodical or frequent overflow as to require levees or embankments to keep out the water and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of the rivers or lakes, or by the overflow of the tide.' "

San. Francisco Sav. Union vs. Irwin (U. S.), 28 Fed. 704, 708.

It is to be noted from these definitions that the subject matter of the jurisdiction of the Secretary of the Interior embraced *lands* as the basic element, and that when these lands were overflowed, and to that extent were covered with and assumed the character of water, that his jurisdiction was limited to those *overflowed* lands which were *susceptible of reclamation* which would render them *subject to cultivation.* It follows as a natural consequence that under the guise of considering overflowed lands, his jurisdiction did not extend to navigable waters, because it would be impossible to drain bottoms of navigable waters without interfering with and destroy navigation, and this could not be done without conflicting with the regulations of the United States on the subject of navigation. It is equally clear that his jurisdiction ordinarily did not include navigable water bottoms, because of the fact that these navigable water bottoms belonged to the State by reason of her sovereignty. We trace in this brief the chain of title of the State of Louisiana, as to these navigable water bottoms

and clearly show that they were not derived from the United States by any act of National legislation other than the Act creating the State of Louisiana, and that these navigable waters and their bottoms atached at once to the State as part of her sovereignth, and such navigable water bottoms were never the subject matter for action under the swamp land grants of 1849 and 1850, which confirms the fact that these navigable water bottoms, because they were overflowed lands, inasmuch as they were covered with water, were not the subject matter of patents to be issued by the Secretary of the Intrior.

Having thus shown by the authorities cited and by the very logic of events that the Secretary of the Interior was without authority to patent to the State the bottoms of navigable waters under the guise that they were swamp and overflowed lands, we are next led to a consideration of what were the powers of the Register of the State Land Office under the laws of Louisiana. The Register of the State Land Office as an executive officer had no power other than that which was given him by the statute of the State, and his acts and patents issued beyond his power and authority were acts beyond his jurisdiction and equally null and void as in the case of the acts of the Secretary of the Interior under similar circumstances.

It is contended by the plaintiff in this case, that the Register of the State Land Office had authority to issue patents to the lands in question, and that the effect of his act was to vest it with title to these navigable water bottoms, on the assumption that the navigable water bottoms, were within the fractional sections patented. The Register acted under the provisions of Section 1, Act 113 of 1859, as to the Pindell patents and as to the subsequent patents the Register of the State

Land Office, acted under the provisions of Section 11, of Act 75 of 1880, and as amended by Act 125 of 1902, which provided that public lands donated by Congress to the State of Louisiana, designated as sea marsh or prairie, subject to tidal overflow, so as to render them unfit for settlement and cultivation, shall be subject to entry and sale, at the rate of 12 1-2c per acre; provided that satisfactory proof of said fact be filed with the Register of the State Land Office.

It will be noticed from this, that the character of lands referred to are those which the Secretary of the Interior was authorized to patent to the State. We have already shown that these Acts of Congress of 1849 and 1850, did not include the bottoms of navigable waters. The only difference between this Act of the State of Louisiana, and these Acts of Congress is that this Act of the State of Louisiana also discusses the subject of entering lands "which are subject to tidal overflow, so as to be rendered unfit for settlement and cultivation. We think it therefore necessary to determine what are lands which are subject to tidal overflow or what are commonly known as tide lands.

> "The words 'tide lands' in the legislation of California applies to land covered and uncovered by the ordinary tide, which the State owns by virtue of its sovereignty."
>
> Rondell vs. Fay, 32 Cal. 354.
>
> "'Tide lands,' as contained in Act May 14, 1861, entitled 'an Act to provide for the sale of the marsh and tide lands of this State,' refers to such tide lands as are subject to periodical overflow, but which are susceptible of reclamation, so as to be valuable for agricultural purposes."
>
> People vs. Morrill, 26 Cal. 336.

"The expression 'tide lands' is to be understood as referring to those lands only which are covered and uncovered by the daily influx and reflux of the tide."

City of Oakland vs. Oakland Water Front Co., 50 Pac. 277, 285; 118 Cal. 150.

"By the words 'tide lands' as used in connection with the reservation of the same by the United States Government for the purpose of navigation, commerce and fishery, is meant that portion of the shore or beach covered and uncovered by the ebb and flow of the tide."

Pacific Steam Whaling Co., vs. Alaska Packers' Assn., 72 Pac. 161, 162; 138 Cal. 632.

"The words 'tide lands' mean land 'that lies between ordinary high-water mark and low-water mark, and which is alternately covered and left dry by the ordinary flux and reflux of the tide. Lands adjacent to navigable waters where the tide flows and reflows, which at high tide are submerged and at low tide are bare, come within such description. It would seem to be correspondent to or be synonymous with 'shore' or 'tract;' and this at common law is that land which lies between ordinary high-water mark and low-water mark."

Andrus vs. Knott, 8 Pac. 763, 12 Or. 501; Elliott vs. Stewart, 14 Pac. 416, 417, 15 Or. 259; Walker vs. Marks (U. S.), 29 Fed. Cas. 36, 37.

"The word 'tide lands' means such lands only as are covered and uncovered by the tide and does not include lands permanently submerged, within the meaning of Act of May 14, 1861, entitled 'an Act to provide for the sale of marsh and tide lands.'"

People vs. Davidson, 30 Cal. 379, 385.

> " 'Tide lands,' as used in an Act to provide for the sale of the marsh and tide lands of the State, means lands covered and uncovered by the tides, and does not include lands permanently submerged by the waters of the Bay of San Francisco."
>
> Walker vs. State Harbor Commissioners, 84 U. S. (17 Wallace), 648, 650, 21 L. Ed. 744.

It is apparent, therefore, that it was the intention of the Legislature not to vest the Register of the State Land Office with power to sell the bottoms of navigable waters, upon the theory that they were tide-lands, but to confine his jurisdiction to those lands which are covered and uncovered by the flux and reflux of the tide. Tide-lands are necessarily not the bottoms of navigable waters.

This is only natural, because lands which were permanently overflowed by the tide, could not well be reclaimed and made fit for cultivation, and lands which were covered with such a depth of water as to make the water navgiable could not, as we have previously stated, be reclaimed without interfering with the right of navigation. We, therefore, assume from this, that neither the Secretary of the Interior nor the Register of the State Land Office had authority to include in a patent to plaintiff, the bottoms of navigable waters, and the conveyance of navigable waters being beyond their jurisdiction, their action if they had done so, was null and void, although as a matter of fact, the evidence in this case, shows that they did not do so, and navigable water bottoms cannot be claimed by the plaintiff, under the patent issued herein, under any theory of its case.

In South Carolina the question came up where a party had title to several thousand acres of land from the Sovereign,

which was described as an Island, and was permeated by various tide water streams. When it was discovered that the beds of these streams in South Carolina contained valuable deposits of phosphate which could be dredged up from their botoms, the owners of this Island claimed—as does plaintiff in this case—that as their title covered the whole superficies, that they owned the beds of these saltwater bottoms, creeks, and lagoons, and were entitled to the exclusive right of dredging the phosphate (as in this case plaintiff claims the exclusive right to oyster fishery). In that case, the Supreme Court of South Carolina held that the

> "title to the soil in all navigable streams in which the tide ebbs and flows remains in the State, and does not pass under her grant of the superadjacent land."
> * * * * * * * * * * * * *
> "The State holds the beds of the channels of her navigable streams, for the public use of her citizens. Such property may be disposed of by Act of Legislature, but may not be granted by her officers, as vacant land * * * it not having been the policy of the State to part with her right to such beds or channels, an Act of the Legislature making a grant of any part of them cannot be presumed."

(State vs. Pac. Guano Co., 22nd S. C., p. 50.)

This authority is quoted with approval by your Honors, in the case of Morris vs. U. S. 174; U. S. 236.

We therefore consider that, looking at the proposition from the point of view of what the swamp land grants of Congress conveyed, it has been clearly demonstrated that they did not convey the bottoms of navigable waters, nor did they even essay to so convey them.

X.

"The surveys made by the United States Government, being the public surveys, fixed the right of United States in the State of Louisiana, fixed the limits of the land, and fixed the limits of the water."

The public surveys, as made by the United States Government, and according to which lands were approved to the State of Louisiana, under the swamp land grants of Congress of 1849 and 1850, clearly show by the descriptive lines thereon, the existence of water and its dimensions and locations. These same surveys correspondingly fix the area of the land, and this area does not include the area of the water. Inasmuch therefore, as these plats of the surveys of these localities which surveys are divided into Townships, clearly show what is land and what is water, the right of the United States to the land, as forming part of the waste and unappropriated land reserved to herself, when the State of Louisiana was created, shows clearly that it was not the intention of the United States, to claim title to the navigable water bottoms. Having established their existence by these surveys, such water areas are by the surveys necessarily segregated and set apart from the area of the land, and not included in conveyances of land.

XI.

"These public surveys of the United States, and the patents issued and described in accordance therewith, and the areas of land mentioned in the patents, and described in accordance with the Township Plats of survey, showed that only land had been conveyed by said patents."

The Township plats of survey, heretofore referred, to, the patents issued by the tate of Louisiana, herein sued on, and the area of the land set forth in said patents, shows conclusively that it was the intention of the State of Louisiana, to convey land only and that land only, had been so conveyed. As an illustration, if reference is made to Patent No. 1038, (transcript p. 87,) it will be noted that this patent purports to convey, Nine hundred and ninety acres. Reference is now made to the first sketch of survey, offered by plaintiff, to be found at trans. p. 94, and it will be seen that this patent 1038 conveys fractional sections of land, within the extension of the limits or lines of which sections the waters of Grand Pass are located. Reference is now made to the computation heretofore made by us, of the area that would be involved in this patent, if it had conveyed the entire area of the section and it will be seen that the patent would call for Three thousand and eighty acres. In other words, under this patent, wherein, plaintiff is now claiming to have title to the bottom of Grand Pass, but Nine hundred and ninety acres of land were actually conveyed, whereas, in order to give plaintiff title to Grand Pass or its water bottom it would have been necessary for the patent to convey Three thousand and eighty acres.

The mentioning of this fact to our minds, demonstrates conclusively, the illogical assertion of the plaintiff, that it thereby acquired title through this patent, to the navigable water botoms of Grand Pass. The same state of facts exists in connection with Creole Gap.

XII.

"Many of the patents, acquired by plaintiff's authors in title, are anterior to adoption by the Legisla-

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ture of the State of Louisiana, of Act 106 of 1886, and therefore, these lands must have been patented without any relation to said legislative act, and other of the patents of plaintiff's authors in title, were issued subsequent to the repeal of said Act 106 of 1886, and therefore, must have been issued without any relation to said Legislative act."

As heretofore stated, plaintiff in its brief, lays stress upon an alleged contract obligation, arising out of the provisions of Section 2, of Act 106 of the Legislature of Louisiana, for the year 1886. An examination of the transcript in relation to the patents sued on, shows them to have been issued on the following dates:

(1) Patent No. 194, March 20th, 1867.
(2) Patent No. 195, March 20th, 1867.
(3) Patent No. 196, March 20th, 1867.
(4) Patent No. 4955, January 26th, 1883.
(5) Patent No. 706, March 16th, 1887.
(6) Patent No. 1038, November 7th, 1887.
(7) Patent No. 1039, November 7th, 1887.
(8) Patent No. 5093, April 27th, 1894.
(9) Patent No. 961, September 12th, 1880.
(10) Patent No. 1040, November 7th, 1867.
(11) Patent No. 761, April 11th, 1887.
(12) Patent No. 870, June 22nd, 1887.

As to those patents which were issued prior to the year 1886, plaintiff will hardly claim that its authors in tilte bought the land with any regard to Act 106 of 1886, as it had not come into existence. As to that Patent (No. 3) which was issued after this Act of 1886 was repealed, certainly the land was bought without reference to it.

XIII.

"That even if any of the patents forming the basis of title of plaintiff's authors in title, were obtained at a time when Act 106 of 1886 was in effect, the right granted by this Act 106 of 1886, was merely a privilege, and appertains only to the planting of oysters, and did not appertain to the harvesting of the crops of oysters growing naturally, and was a privilege that the Legislature had a right at any time to revoke, and did not form the basis of any contract."

Having shown that as to those patents issued prior thereto, Act 106 of 1886 could not have had any relation and that this would also apply to patents issued after the repeal of that Act, we now come to a consideration of the question as to whether the lands bought during the time that Act 106 of 1886 was in effect, were in any way, affected by said Act, in so far, as to give the owners of said land contract obligations in regard thereto, which could not be revoked.

We have already demonstrated the fact that this Act 106 of 1886, specifically excluded natural oyster reefs, and reserved the same for the benefit of the state and public, and did not give them to the owners of the adjacent land, and that the waters in question produced oysters naturally. We have shown that the only right granted by section 2 of this Act, was the right of planting and cultivating oysters in the adjacent waters, and not the right of harvesting naturally grown crops of oysters.

But, let us suppose for the purpose of argument, that at the time, plaintiff's authors in title purchased these lands, it did so, in direct relation to the privilege granted by Act 106 of 1886. Our assertion is, that this constituted no contract, and

gave no vested right to the purchaser of said land, because the right that was temporarily conferred was merely a privilege which could be removed at any time. Act 106 of 1886, was repealed by Act 110 of the Legislature of Louisiana, for the year 1892, page 142. The plaintiff contends that this repeal is null, void and unconstitutional, because in conflicts with the Constitution of the United States, forbidding the passing of laws, imparing the obligations of contracts. This, we think, is totally untenable. It is well established that the general laws of States, granting privileges or exemptions to all in the State—individuals, firms and corporations—*where no consideration passes, contain no element of a contract and are mere bounties,* gratuities, *privilegia favorabilia,* and are not protected by that provision of the Constitution of the United States, in relation to the impairment of contract obligations.

The most common form in which these questions have come up, has been in the matter of exemptions from taxation. Mr. Colley, in discussing this matter, says:

> "That the exemptions of corporation franchises and property which are granted on considerations of public policy may be cancelled whenever the legislative views of public policy may change, and the individuals, corporations and associations designated by them are to regard them as favors or privileges, merely to continue during the sovereign pleasure, and there can be no breach of faith—certainly not want of power—in terminating them at any time."
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> Cooley on Taxation, Chap. 6, pp. 145-154.

The leading case on this subject is that of the *East Saginaw Salt Manufacturing Company vs. The City of East Saginaw,* decided by your Honors in 13 Wallace, p. 373.

In that case the State of Michigan passed a law exempting all persons engaged in the manufacture of salt, and all property, real and personal, used for that purpose, from taxation for any purpose, and further provided for the payment of a bounty to any person, or any corporation, that should be so engaged in the business of manufacturing salt, of the sum of ten cents for the each barrel of salt so manufactured. Subsequently this law was repealed, and the claim was made that it was a contract protected by the Constitution of the United States, and that the reepealing thereof, was an act impairing the obligation of a contract. In deciding the case, the Court said:

> "In short, the law does not, in our judgment, belong to that class of laws that can be denominated as contracts, only so far as they have been actually completed. If there is any stipulation imposed and complied with, it shall not be repealed, but general encouragements held out to all persons to induce them to engage in a particular business, whether such encouragement be in the shape of bounties or draw-backs, or other advantages, are always under legislative control and may be discontinued at any time."

In the case of the Rector of *Christ Church of Philadelphia et al. vs. The County of Philadelphia*, decided in the Supreme Court of the United States, 24 Howard, p. 300, it appears that the Legislature of Pennsylvania passed an Act which recited:

> "That Christ Church Hospital, in the City of Philadelphia, has for many years afforded an asylum for numerous poor and distressed widows, who would probably else have become a public charge; and it be-

> ing represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means are curtailed and its usefulness limited, 'they enacted' that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the City of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes."

Subsequently this law was practically repealed so as to make the property of the hospital taxable. The corporation went into court and claimed that the exemption was perpetual, and the Act itself was in effect a contract. The Court said:

> "This concession of the Legislature was spontaneous, and no service or duty or other remunerative condition was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia*. It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts, that the concession is perpetual, or was designed to continue during the corporate existence.
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> * * * * * * * * * * * *
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> "The Act of 1833 belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the Legislature. All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interest of society. * * *
>
> "It is in the nature of such a privilege as the Act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign."

This jurisprudence was well considered by our Supreme Court of Louisiana, in the case of the *Grand Lodge of Louis-*

iana, vs. The City of New Orleans, 44 La. An., p. 659, and it was therein held that where any concession passes from an act of the Legislature, and the same is a mere license, a mere bounty, a mere gratuity, that the same implies no contract, and is not protected by the provision of the Federal Constitution forbidding the impairment of the obligations of a contract.

This matter was well considered also in the case of *Hass vs. Muir, et* al., 65 Maryland, p. 586, where the laws of the State of Maryland gave the riparian proprietor the right to stake and lay off five acres of land in front of his property, and have the exclusive right to the said five acres for the planting, propogating and cultivating of oysters, in which case the same contention was set up as in the instant case, that same was a contract protected by the Federal Constitution. The Court says, in the syllabus:

> "The privilege of locating oyster lots is without the elements of a grant by patent, it is simply a license revocable at the pleasure of the Legislature, simply a personal privilege of the recipient, neither inheritable or assignable. The oysters deposited by the holder of the license remain as personal property during its continuance, with the right of selling or otherwise disposing of them, but the territory remains under the control of the State."

It seems to us that this is a perfect statement of the law of the case, and is conclusive of the plaintiff's contention, on this phase of its case, and is a complete refutation of such contention by plaintiff.

XIV.

"The privilege granted by Section 2 of Act 106 of the Legislature of the State of Louisiana for 1886,

were repealed by Act 110, *of the Legislature of the State of Louisiana, for the year* 1892."

As heretofore stated, Act 106 of 1886, on which the plaintiff lays so much stress, was repealed by Act 110, of 1892. Under the authorities just cited, the Legislature had full authority to repeal this law, and revoke its privilege of the right of planting oysters exclusively on the water area, adjacent to one's property. The law having been repealed, it necessarily follows that the subsequent purchases of property, made by the authors of plaintiff's title, after the repeal of this act of 1886, could not possibly have been made with reference to any right alleged to be granted under the Act of 1886.

XV.

"In accordance with the jurisprudence of the State of Louisiana, a purchaser of lands from the State, gets only in acres what he buys and pays for per acre."

We have already called the court's attention to the fact, that the acreage claimed by plaintiff in its petition, and alleged by it as being contained in its title, is about Six Thousand, Eight Hundred and Nine acres. We have also shown the fact that, if the contention of the plaintiff were correct, that it had title to Sixteen Thousand, One Hundred and Sixty Acres, or Nine Thousand, Three Hundred and Fifty-One and Forty-One Hundredths Acres, (9,351.41) more than it had paid the State for. The Act of the State Legislature authorizing the sale of land, fixed the price per acre that the purchaser is required to pay for the land that he buys. The laws of the State of Louisiana, provide, that the purchaser only gets what he pays for,

and the jurisprudence of the State of Louisiana, is in accord with that proposition.

In the cases of *McDade et al. vs. Bossier Levee Board,* 109 La. An. 625, and in *Hall et al., vs. the Board of Commissioners of the Bossier Levee District,* 111 La. An., 913, the Supreme Court of the State of Louisiana, recognized and laid down its approval of the proposition, that where a purchaser bought by the acre, he only acquired the number of acres called for in his patent, and could not claim more than this.

XVI.

"The Laws and jurisprudence of the State of Louisiana, do not recognize, as may be the case under some circumstances, in the common law states, that a purchaser of a fractional section of land, at a stated rate per acre, gets as a bonus, navigable water bottoms, included within the limits of the remainder of his fractional sections."

The two acts of the Legislature on the subject of the sale of the bottoms of dried lakes are the only legislation in Louisiana, authorizing the sale of what was, at one time, a water bottom. We submit that neither of these two acts, evidence any intention, will or desire of the people of this State, that any of their tide-waters, or the soils of their tide-waters, should be sold; and we state, without fear of contradiction, that no authority has ever been given by the people of the State of Louisiana, through their Legislature, to the Register of the State Land Office, authorizing him to sell water, or beds or soils under the water; and no act of his can have effect to divest the State, or the people of the State, of these waters, and transfer them to any one else.

Indeed, this is not new matter. In Gould on Waters, page 88, the author says:

> "State laws providing for the entry and sale of public lands, or for the sale of swamp and overflowed lands, do not extend to the soil beneath navigable waters, and no right to obstruct navigation passes to purchasers under such laws."

We have previously referred to the South Carolina case, where a similar conclusion was reached by the Supreme Court of that State.

Our own Supreme Court of Louisiana, in the instant case, which now comes to your Honors on this Writ of Error, held as follows: (transcript p. 59

> "There can be no such thing, in this state, as private ownership of the bed of a navigable river, and, a fortiori, can there be no such thing as private ownership of the bed of the sea or of an arm of the sea. In a case decided many years ago, this Court (referring to certain lands lying beneath the waters of Lake Ponchartrain and claimed by the plaintiff) said: 'It appears to us that the testimony shows, fully, the ground in question lies much below high water mark and forms part of the bed of the lake, and is not, therefore, susceptible to private ownership."

Milne vs. Girodeau, 12 La., 325.

And, to the same effect was the decision in Zeller vs. Yacht Club, 34 La. An. 837.

* * * * * * * * * * * * * * *

> "We consider, then, that the grants under which plaintiff claims—being of land bordering upon, and

partially surrounded by, the tide water of the Gulf of Mexico—carry its titles no further than high-water mark, and that, in so far as it (plaintiff) asserts ownership and possession, under such titles, of land lying beneath the waters, which surround the tracts of dry land included in said grants, or, lying beneath any navigable passes, or channels, which intersect such tracts or separate them from each other, the exception of no cause of action, was property maintained."

The authorities here cited, clearly establish the jurisprudence of our Supreme Court, in which there has never been any change.

It may differ from the Common Law, but in as much as the real estate is located in the State of Louisiana, we have already shown, it must be determined by the Civil Law of Louisiana, the Statutory Law of Louisiana, and the Jurisprudence of the State of Louisiana, and when so determined, the demands of the plaintiff must be rejected.

XVII.

"The State of Louisiana is vested with full power and authority to control her navigable waters and to use the same, according to such laws as she may enact, for the purpose of oyster culture and the development of the oyster industry, within the limits of said state."

The plaintiff in its brief, in its application for a rehearing before the Supreme Court of Louisiana, and in its petition for a Writ of Error, herein seems to dispute the power of the State of Louisiana, to regulate its own oyster industry. The absolute control by the State, over fisheries in her waters, and her right to lease portions of her water bottoms for pur-

poses of shell fish cultivation, is too well known and undoubted to admit of discussion.

Am. and Eng. Enc. of Law; Verbo Fisheries.

Nothing is better settled than that the States hold the navigable waters and the tide waters and the beds and soils thereof, in trust for the common benefit of all of their people, and that the fisheries inside of the three-mile limit are absolutely under the control and jurisdiction of the State, and that she has this right to control and administer the fisheries within her State limits, no matter what the waters thereof, with the exception only of private fish-ponds within the holdings of some citizen, but that in any public waters her absolute control of the fisheries has never been questioned or doubted.

McCready vs. Virginia, 94 *U. S.* 391.

In the case of *Proctor* vs. *Wells,* 103 Mass. 216, the State sold the soil under tide water to the town of "Ipswich."

The town sold a portion thereof to an individual. This proprietor brought suit to prevent individuals from fishing clams on the bottom of the tide water to which he claimed title. The Court held:

> "A grant by the Legislature to a town of the title in the bed of a river, or any flats covered by tide water within its limits, does not convey by implication, the right of fishing to the town as its own property; for the right of fishing not being an incident to the right of property in the soil, but a public right to take the fish whether moving in the water or imbedded in the mud covered by it, depending upon the water for their nourishment and existence, is unaffected by the question whether the title in the land

under the water is in the Commonwealth or in private persons."

See also 4th Mass., 140 and 315.

XVIII.

"The State of Louisiana, has for a number of years, been regulating the oyster industry in her navigable waters, and has evolved a comprehensive and effective system of laws for its development, and is entitled in the fostering and development of that industry, to enforce its code of laws."

An examination of the statutes of the State of Louisiana, will show the following enactments by that State, on the subject of its oyster industry, to-wit:

Act 18, of 1870, page 43, regulating the season for fishing oysters.

Act 91, of 1871, page 207, regulating the season for fishing oysters.

Act 106, of 1886, page 195, providing a comprehensive system, for regulating the oyster industry in Louisiana.

Act 110, of 1892, page 142, providing a comprehensive system, for regulating the oystem industry in Louisiana.

Act 121, of 1896, page 170, providing a comprehensive system, for regulating the oyster industry Louisiana.

Act 153, of 1902, page 274, providing a comprehensive survey, for regulating the oyster industry in Louisiana, and creating the Oyster Commission of Louisiana.

Act 52, of 1904, page 113, providing a comprehensive system for regulating the oyster industry in Louisiana.

Act 178, of 1906, page 317, amending Act 52 of 1904.

Act 167, of 1908, page 223, amending Act 178 of 1906, providing for the handling of the funds of the State derived from its oyster industry.

Act 291, of 1908, page 431, amending Act 52 of 1904, on the subject of preventing robbing of private oyster beds.

Act 49, of 1910, page 82, providing that the surplus revenue from the oyster industry, should go to the State Highway Fund.

Act 189, of 1910, page 302, providing for a comprehensive system, for regulating the oyster industry in the State of Louisiana and vesting the control of said industry, in the Board of Commissions for the Protection of Bird, Game and Fish.

Act 98, of 1888, page 157, regulating the measure to be used in the sale of oysters.

Act 25, of 1894, page 38, regulating the measure to be used in the sale of oysters.

Act 92, of 1908, page 134, regulating the standard measure for the sale of oysters.

Act 51, of 1910, page 85, regulating the standard measure for the sale of oysters.

In 1912, the Legislature of the State of Louisiana, placed the control of its oyster industry in the hands of the Conservation Commission of Louisiana, but this Act has not yet been published in book form.

It will appear from the foregoing citation of the statutes of Louisiana, on the subject, that the State of Louisiana, through its Legislature, has for many years, been giving careful attention to the development and fostering of the oyster industry in that State. As was shown in the transcript of the record in the case of the State of Louisiana vs. the State of Mississippi, 202 U. S. 1, the oyster industry in the State of Louisiana has attained great proportions, and a large portion of that business is carried on, in the waters of Mississippi Sound, adjoining the land owned by the plaintiff herein.

Because these laws of Louisiana, do not give to the petitioner, the right to the natural oyster product of those waters, without paying therefor, plaintiff characterizes these laws as impracticable. It also alleges that they are unconstitutional, because they impose a tonnage tax on vessels, and because a police patrol is maintained by the State, to enforce its oyster law.

One of the provisions of the oyster law of Louisiana, is to the effect that it charges vessels for the privilege of fishing oysters from the natural reefs, the property of the state, and adjusts this charge for that privilege, in accordance with the tonnage of the vessel. Plaintiff claims that this is in violation of the Constitution of the United States. This whole subject matter was fully considered by the United States Circuit Court for the District of Maryland, in the case of *Dize* vs. *Lloyd* et al., 36 Fed. Rep. p. 651, the syllabus of which decision is as follows:

> "The Maryland Oyster Law of 1886, p. 296, exacting a license fee of $3.00 per ton for every vessel employed in dredging for oysters in the waters of the

> State, *held*, not a tonnage tax, but a lawful compensation, demanded by the State, as the proprietor of the oyster beds, for the privilege of taking the oysters, which it is reasonable to rate, according to the size of the vessel used."

The courts of this country have also held, that statutes of a state, enacted for the purpose of maintaining a police patrol on the waters of the State, for the purpose of enforcing the police laws of the state, were not in conflict with that provision of the Constitution of the United States, which gave to the United States the right alone to maintain a navy, as the maintaining of police boats for the enforcement of the police laws of the state, was not considered as the maintenance of a navy.

We think this disposes of about all the objections that Counsel for plaintiff makes to this system or code of oyster laws.

We have read with much interest, the brief which has been filed by Counsel for plaintiff herein. One of its features which struck us most forcibly, was the fact that Counsel have gone beyond the record in setting forth what they claim are the facts in this case. Our contention is, that only those facts can be adverted to, which are set forth in the petition of plaintiff, or in the exhibits which have been offered in evidence, or in the testimony which has been taken. It is true that the entire record in the case of the *State of Louisiana vs. State of Mississippi* has been offered in evidence with the understanding that reference may be made thereto by Counsel for any of the parties in this litigation. We are of the opinion however, that assertions of fact are made by Counsel for plaintiff, which are not borne out by anything in the rec-

ord, even inclusive of the transcript of the case of the State of Louisiana vs. State of Mississippi.

We are of the opinion as an illustration, that, there is nothing in the record that will substantiate the allegations of fact, which are set forth on page 11, of the brief of counsel for complainant.

Counsel for complainant suggest that the oyster commission of Louisiana, one of the defendants in this case, has no right to interfere with the plaintiff in the enjoyment of these oyster producing waters claimed by the plaintiff, and cites in purport thereof, Section 10, of Act 178 of the Legislature of Louisiana, of 1906, page 323, and quotes an extract from this section of the law. As they have only quoted a portion of this section, we here reproduce it in full:

> "Section 10. Be it further enacted, etc., That the said Commission shall have power to lease any water bottoms in this State of Louisiana, as described in Section 1 of this Act., and the title whereof is vested in the State of Louisiana, and is not claimed under some title by any person; and no *lease* of any bottom which may be so claimed by a private individual, firm or corporation, shall be valid or have any effect, until there shall have been an adjudication by a court of competent jurisdiction between the State and claimant as to the validity of the title of the property *to be leased;* provided that they (sic. this) shall not apply to any property that has not heretofore been alienated by the State; or the title to which is now in litigation,— and desirable for purposes of bedding, planting, and cultivating or propagating oysters. No natural reefs shall be leased, except as provided for in Section 17 of this Act. These leases can only be made to citizens of Louisiana, Louisiana firms, composed of citizens of

> Louisiana, and Louisiana corporations domiciled in this State. No one person or corporation shall hold or own stock in several oyster corporations, leasing oyster bottoms where the aggregate value of said stock, in addition to their other holdings, would exceed the maximum value of a corporation organized to develop and own a one thousand (1,000) acre farm and its necessary equipment, factory, working capital, etc. All others are forbidden to hold these leases either as original lessees or as heirs, assigns or transferees, whether such assignment or transfer be conventional or judicial, voluntary or forced." (Italics ours.)

It will appear from the above that in the printing of the brief for Counsel for complainant, an error was made, in the use of a period at the end of the quotation from Section 10 of Act 178 of 1906, as appears on page 13 of their brief. As a matter of fact, the punctuation in the original Act, is a semi-colon, and this semi-colon is followed by the words:

> "provided that they shall not apply to any property that has not heretofore been alienated by the State, or the title to which is now in litigation,—and desirable for purposes of bedding, planting and cultivating or propagatng oysters."

In other words, it appears from this, that the law which they refer to, has no application, if the State has never made a title to such water bottom area. It is our contention in this instance, that the State of Louisiana, never included this water bottom area in the patent upon which plaintiff sues, and therefore, that this Act of the Legislature, referred to by plaintiff, would have no application. It is further to be noted, that all the Act of the Legislature prohibits, is, the *leasing*

to any one, of water bottoms, which another claims title to. There is no contention made, in this proceeding, that the Oyster Commission of Louisiana, is trying to lease these water bottoms to anybody. As a matter of fact, the petition of the plaintiff itself, makes the opposite allegation, namely that Lopez & Dukate, Inc., applied for a lease of these water bottoms, and that its application was refused. It therefore clearly appears that, the Oyster Commission of Louisiana, did not undertake to lease these water bottoms to anybody. The reason for this is found in the very quotation from Act 178 of 1906 above cited, in that provision which says that "No natural reef shall be leased, except as provided for in Section 17 of this Act." These water areas being natural oyster producing water areas, and therefore the bottoms being natural oyster reefs, the Oyster Commission of Louisiana was compelled to follow the law, and lease these water bottoms to no one, but on the contrary, to hold them open for the benefit of the public, in the matter of fishing oysters, and the testimony taken in the record shows that oysters have been taken from these waters since time immemorial by the general public, without molestation from anyone, until the institution of this suit by the plaintiff. It further appears on the very allegation of plaintiff itself, that these bottoms were not subject to lease, for the reason that it alleges that Lopez and Dukate, Inc., applied for the leasing of the bottoms and that the Oyster Commission of Louisiana, refused to make a lease. In place therefore, of the petition alleging any violation of Section 10 of Act 176 of 1906, it seems to us that the allegations of the petition are clearly to the effect that the Oyster Commission of Louisiana, is complying strictly with the provisions of that law, or did so comply, at the

time this law was in effect, certainly, in so far as the issues involved in this litigation are concerned.

As a matter of fact, Act 178 of 1906 was superseded by Act 189 of the Legislature of Louisiana, for the year 1910, page 302, and no benefit can therefore be now claimed by the plaintiff, from the law so referred to by it.

In the second paragraph of page 19 of their brief, Counsel for plaintiff, again make allegations of fact, which are not borne out by the record. They would have the court to believe that this is a fresh water marsh, when as a matter of fact, it is nothing but a sea marsh. Of course geologically, the area in controversy was formed by alluvion from the Mississippi River, at the time that the Mississippi River was accustomed to overflow its banks. It was shown, however, in the record in the case of the State of Louisiana vs. State of Mississippi, heretofore referred to, that since the erection of a system of levees on the banks of the Mississippi River, there has been no overflow of these banks, except at such times as crevasses occurred, and that these times were very infrequent, and the effect was merely temporary. As was clearly demonstrated, in the case of the State of Louisiana vs. State of Mississippi, the geological tendency for the last one hundred years or more in that locality, has been one of subsidence and disintegration, on account of the stoppage of the annual compensation, which came in the shape of the deposit of alluvion which used to occur, prior to the erection of the levee system, the levee system being in existence for over a hundred years and its presence in confining the river waters within its banks having stopped this annual deposit of alluvion. Geographically, it can be readily seen, that Isle a Pitre, plaintiff's property, projects into the salt water of

Mississippi Sound and the Gulf of Mexico, and that the only fresh water that could ever find existence there, would be that which would come in the form of freshets in the Mississippi Sound, from Pearl River, lying to the Northwest of this locality, distant some fifteen or twenty miles.

How Counsel for plaintiff have the temerity to suggest and urge that the principle of alluvion under the civil law of Louisiana, applies in their instance, is beyond our comprehension. The subject matter is covered in our Civil Code, as follows:

Civil Code of Louisiana, Article 509.

> "The accretions, which are formed successively and imperceptibly to any soil situated on the shore of a river or other stream, are called alluvion.
>
> "The alluvion belongs to the owner of the soil, situated on the edge of the water, whether it be a stream or river, and whether the same be navigable or not, who is bound to leave public that portion of the bank which is required by law for the public use."

There is no stream, nor is there any river in this locality. The very location of the property shows that it is not fresh water. It is true that originally, geologically, Isle a Pitre, was formed from alluvion deposited from the annual overflow of the Mississippi river, in the development of the State of Louisiana, as it was geologically built up, out of the sea, but it is equally true, that Isle a Pitre is now part of the seashore of Louisiana and it has already been established by the decision of the Supreme Court of Louisiana that the shore of Lake Pontchartrain, which is very much further from the Gulf of Mexico or open sea, and the shores of which lake were

themselves also geologically formed by the deposits from the Mississippi River, in the early geological history of Louisiana, that the shores of said lake form part of the seashore of Louisiana.

Counsel for plaintiff, in support of the contentions urged by them, refer to the case of *Morgan vs. Nagodich*, 40 La. An. 246. All that this case decided was, that the banks of Bayou Cook in the Parish of Plaquemines, State of Louisiana, did not form a part of the seashore. In that case, it was alleged by Antonio Nagodich, the defendant, that he had a right, under Article 452 of the Civil Code of Louisiana, to erect his fishing camp, on the bank of Bayou Cook, because it was a part of the seashore. Morgan, the plaintiff, claimed title to the bank of Bayou Cook, under a patent, and the Court held, that inasmuch as Morgan owned the land, and inasmuch as the bank of Bayou Cook was not a part of the seashore of the State of Louisiana, Nagodich could not occupy the real estate with his fishing camp, without renting from Morgan. According to the facts as found by the Supreme Court of Louisiana, in that case, the point in question was many miles distant from the Gulf of Mexico, and the court found that Bayou Cook was a bayou in which there was a considerable mixture of salt water and fresh water, for the reason that this bayou acted as a natural drain for the landed area lying north thereof.

It is true, that in that case, the court also took up the provisions of Act 106 of 1886, as applying to the right of an owner of the adjoining property, to the exclusive privilege of using the water between his land, for oyster cultivating purposes. At the time of the institution of that suit, in the court of original jurisdiction, and at the time of the decision of

that suit, Act 106 of 1886, was in full force and effect and had not been repealed, and it was therefore perfectly natural that the court of Louisiana should, at that time, have recognized the right which that Act then granted. The Court, however, did not say that there were any elements of a contract as implied from this act, or that the State was without power to repeal said Act. The case, therefore, in our opinion, has no application to the issues involved in the suit now before your Honors for consideration.

We also note the argument of Counsel for plaintiff, to the effect that inasmuch as the State of Mississippi, has seen fit to grant to the riparian proprietors in that State, the exclusive right for a distance of 1,500 feet from shore, or to the channel, in the matter of the use of the waters of that State, that the laws of Louisiana should be construed accordingly. This is in direct conflict with the proposition of law which we have announced and established, and which your Honors have approved, to the effect that the right of use of the waters in any state is determined by the laws of the state in which the land and water is located. If, therefore, the State of Mississippi concludes to give such rights to its riparian proprietors, there is no reason in law why the state of Louisiana should do likewise. The State of Louisiana has perfect right, to determine just what privileges its riparian proprietors shall enjoy, and having so determined what these privileges are, it is the duty of the Courts of the State of Louisiana, and of the United States, to enforce the laws of Louisiana, in regard to Louisiana waters and Louisiana lands.

Counsel for plaintiff as supporting their contentions, also refer to the suit of the *Board of Commissioners for the Caddo Levee District vs. Glassel*, 120 La. An. 400, and they lay

down a proposition of law, as enunciated in said case, and endeavor to apply that proposition to the facts in this case. An examination of the record in that case will show, that it was a suit affecting the bottom of a dried-up lake. The defendant in that instance had purchased a certain area of land, which included a certain portion of this dried-up lake, from the Board of Commissioners for the Caddo Levee District, the purchaser of the lands making no survey. Subsequently, or at the time of the payment of the notes which had been given by the purchaser as part of the purchase price, the purchaser set up the contention, that there was a portion of the area involved which constituted the bottom of a navigable stream, and he desired to have a reduction made in the purchase price. The Supreme Court of Louisiana held, that he had to take the land as he got it, and that if he got title to less than he had expected to get, that he lost his right to complain because he had not caused a survey of the land to be made at the time he purchased it. There was no proposition enunciated in that case that would have any application in determining the issues involved in this case.

The proposition advanced by plaintiff, to the effect that it is recognized by recent authority, that private ownership of oyster producing bottoms is the only hope for the future of the oyster industry, and that this species of title is the only assurance for the successful operation and production, is an argument that has no place in a brief before your Honors, but should be addressed to the Legislature of the State of Louisiana, should plaintiff desire to induce that body to change its policy, in the matter of handling the oyster producing territory in the state of Louisiana.

Plaintiff in its brief, at the bottom of page 56, makes the following remarkable allegation of fact:

> "This property claimed by plaintiff is entirely alluvion, suffering from inundations of rainfall and subject to overflow of fresh waters which have formed a fresh-water basin from the Mississippi River by crevasses or back waters of the delta. The various minor streams or bayous are drains which remain from a former time and are a part of the realty, draining these lands, but remaining below sea-water level, and belong exclusively to the owner of the realty, and where navigable, as to which there is no issue in this case, as none of the streams is of this character, the owner would take exclusive use of the bed of the stream as proprietor of both sides."

Paralleling this, plaintiff, on the top of page 54, of its brief, cites the following extract from the decision of the court, in the case, *State of Louisiana vs. State of Mississippi*, 202, U. S., 37-46, To-wit:

> "Certainly there are in the body of the Louisiana marshes, or St. Bernard peninsula, portions of *sea marsh* which might technically be called islands, because they are land entirely surrounded by water; but they are not true islands. They are, rather, as the Commissioner of the General Land Office wrote the Mississippi Land Commissioner in 1904, 'in fact, hummocks of land surrounded by the marsh and swamp in said townships.'" (Italics ours.)

These two propositions are absolutely destructive of and contradictory of each other. A locality cannot be *sea marsh*, and at the same time be *fresh water marsh*, as is suggested by the plaintiff. There is absolutely nothing in the record to

indicate that this is a fresh water marsh, and as a matter of fact, there is everything in the record to indicate, that it is a salt water marsh, as found by the Supreme Court in the boundary case of Louisiana vs. Mississippi, just above referred to.

We have carefully noted the authorities cited by the plaintiff, in support of the contentions that it makes in this case. These authorities affecting land titles are all taken from the common law States. We have specially noted its quotation from the decision of the Supreme Court, in the case of *Hardin vs. Jordan,* 140 U. S. 380, in which the proposition is laid down, that it has been the practice of the Government from its origin, in disposing of the public lands to measure the price to be paid for them, by the quantity of upland granted, no charge being made for the lands under the bed of the streams or other body of water and that the meander lines, run along or near the margin of such waters, are run for the purpose ofascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.

This certainly is not the law of the State of Louisiana. Such being the case, and these lands being located in the State of Louisiana, the plaintiff cannot claim the benefit of the common law, or the decisions of our Courts founded on the Common law, as affording it any advantage in its contentions in connection with lands situated in the State of Louisiana.

The latest decision of the Supreme Court of Louisiana, on the subject of title to navigable water bottoms, is that rendered by that court on March 11th, 1912, in the case of the

State of Louisiana vs. Bayou Johnson Oyster Co., Ltd. This decision appears in the Southern Reporter, Vol. 58, page 405, pamphlet No. 6, and at the time of the writing of this brief, is not yet published in the volume form of the Southern Reporter, or in the volume form of the Louisiana Annuals. In that case, the facts in favor of the party claiming title, were much stronger than they are in this case, in as much as in the approval of the area to the State of Louisiana, under the swamp land grants, the entire area of a section was approved, regardless of whether any portion of it, constituted navigable water bottoms or the tidal overflow lands, and the whole of each government section was admittedly sold by a subdivision of the State Government. The Supreme Court of Louisiana, however, held, that all that the State of Louisiana, through its officers, was authorized to sell, was the land, and that there existed no authority to sell any of the navigable water bottoms.

This decision is quite lengthy, and having been but recently rendered, we have therefore, put it in the form of an appendix to this brief, and we respectfully refer your Honors thereto.

For the reasons therefore, which we have urged in this brief, we respectfully submit, that there was no error in the decision of the Supreme Court of the State of Louisiana in determining the issues involved in this case, and that that decision should be affirmed.

Respectfully submitted,

JOHN DYMOND, Jr.,

Attorney for the E. C. Joullian Canning Co., and Dunbars, Lopez and Dukate Company, Defendants in Error.

APPENDIX.

(130 La.)

No. 18,789.

STATE vs. BAYOU JOHNSON OYSTER COMPANY, Limited.

(Supreme Court of Louisiana. March 11, 1912. Rehearing Denied, April 22, 1912.)

(Syllabus by the Court.)

1. NAVIGABLE WATERS (§. 36*)—LANDS UNDER WATER—TITLE.

All the soil within the limits of her territory lying beneath the waters of sounds, bayous, creeks, channels, lakes, bays, coves, and inlets, bordering on the Gulf of Mexico, and within the ebb and flow of the tide were acquired by the state of Louisiana, upon her admission into the Union, by virtue of her inherent sovereignty, and the United States never assumed to grant such soil under the acts of Congress of 1849 and 1850 (Act March 2, 1849, c. 87, 9 Stat. 352; Act Sept. 28, 1850, c. 84, 9 Stat. 519) relating to swamp and overflowed lands, or other acts; there being no legislation authorizing such grants, and the United States having no interest or control of such soil, save in so far as necessary

to the exercise of the power to regulate commerce, as vested in it by the Constitution.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36;* Boundaries, Cent. Dig. §§ 95, 108, 111, 112, 115-117, 121, 122.]

2. NAVIGABLE WATERS (§. 36*)—LANDS UNDER WATER—TITLE.

The Secretary of the Treasury having, at the instance of the state of Louisiana, caused certain sea marsh lands, lying in the peninsula of the parish of St. Bernard (which extends to the eastward and is bounded, north, east and south, by the sounds of the Gulf of Mexico), to be examined, and they having been listed by section numbers, with approximate estimates of acreage, the approval of the list vested titles to the lands in the state; but such action in no manner affected the title which the state had acquired by reason of her admission into the Union to the soil under the adjacent, intersecting, and inter-communicating tide waters and streams, and when thereafter the state conveyed said lands to the board of commissioners of the levee district wherein they lie, by an act referring to lands granted by Congress and acquired through tax sales, such conveyance conferred no authority upon such board to sell said tide water bottoms and beds of streams, or to sell the land, as of ascertained acreage, and the purchaser could take nothing but the actual lands (as contradistinguished from the soil beneath the waters) found within the sections designated in his act of purchase.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36;* Boundaries, Cent. Dig. §§ 95, 108, 111, 112, 115-117, 121, 122.]

3. NAVIGABLE WATERS—(§. 37*)—LANDS UNDER WATER—TITLE.

Though there may be no legal impediment to the state's alienating the soil, lying beneath her navigable streams and tide waters, save in so far as such alienation might conflict with the power vested in Congress to regulate interstate and foreign commerce, her declared policy has always been not to do so, and any statute or contract from which such effect is claimed should be strictly construed against the grantee.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 37.*]

4. NAVIGABLE WATERS (§. 36*)—LANDS UNDER WATER—TITLE.

The rules governing the ownership and alienation, by the state and the United States of the soil lying under the water of shallow lakes and non-navigable streams, not within the ebb and flow of the tide, are different from those by which the control of tide water bottoms and the beds of navigable streams are governed.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by the State against the Bayou Johnson Oyster Company, Limited. From a judgment for the State, defendant appeals. Affirmed.

H. L. Favrot, W. S. Parkerson, and P. S. Gidiere, for appellant. Walter Guion, Atty. Gen., and H. C. Cage, for the State.

STATEMENT OF THE CASE.

MONROE, J. The State of Louisiana asserts title to, and prays to be recognized as owner and put in possession of, certain bodies of water, with the soil under them, which, if they could be said to have been included in a certain examination, or survey, to which we will refer hereafter, would be parts or township 11, south, range 19 east, Southeastern district of Louisiana, east of the Mississippi River, said township forming part of the peninsula of the parish of St. Bernard, which extends eastward from the mainland and is bounded on the north by Lake Borgne and Mississippi Sound, and on the South and east by other sounds and bodies of water connecting those mentioned with the Gulf of Mexico. This peninsula and the bodes of water in question are delineated upon a map which is annexed to plaintiff's petition, whereon some of the said waters are designated (others being unnamed) as "Mississippi Sound," "Johnson Bayou," "Johnson Bay," "Picnic Bay," "Jones" or "Drum Bayou," "Turkey Bayou" and "Turkey Bay." The waters are salt, are within the ebb and flow off the tides, abound in floating and shell fish, and cover the bottoms to a depth, varying in different places, of from 2 1-2 to 12 feet.

Defendant alleges that it acquired the property in question through mesne conveyances from plaintiff, and that plaintiff acquired it from the government of the United States, as swamp and overflowed land, agreeably to the provisions of the acts of Congress of March 2, 1849 (Act March, 1849, c. 87. 9 Stat. 352), and September 28, 1850, (Act Sept. 28, 1850, c. 84, 9 Stat. 519); that, by selecting and accepting said property as swamp and overflowed land, inuring to her under

said statutes, failing, at that time, to assert that she had acquired the same by virtue of her sovereignty, holding and offering it for sale, and finally selling it as public land, subject to sale, plaintiff relinquished and abandoned any prior or other title that she may have had, and has in effect estopped herself to assert the claim which is now set up; and that it (defendant) having bought said property in good faith, and paid the price fixed by plaintiff's statutes, as for swamp and overflowed land which plaintiff was offering for sale, the divestiture, in the manner proposed, of the title so acquired, would amount to a taking of private property for public use without just compensation and without due process of law. It is further alleged that, since acquiring the same, defendant has placed improvements on said property to a value exceeding $5,000, and that the judgment prayed for by plaintiff would leave defendant remediless with respect thereto.

It appears from the evidence that, in 1844-45, an examination and partial survey was made, presumably by order of the Secretary of the Treasury, of the lands in the township in question, and that the field notes of the surveyor, together with a plat purporting to show said lands, as, also, the bodies of water mentioned in plaintiff's petition, were returned to, and certified by, the Surveyor General of Louisiana, who thereupon certified a list of said lands to the Secretary of the Treasury, by whom the same was approved. The plat shows fractional sections exclusively, but gives no calculations of the land areas and no indication of traverses of the bays and bayous, etc., which appear on it. The field notes contain frequent mention of lines running *to* the bodies of water, and *to* the coast, and not infrequent mention of traverses of

streams; but there is an explanatory note added by the surveyor which reads as follows:

> "Note. The boundary and section lines embraced in this book were *not* run,—the face of the country being such as to render it impossible to extend the lines and establish durable corners. It is low marsh, subject to overflow, except where noted, when easterly winds prevail; consequently wholly unfit for cultivation, which, of itself, is deemed sufficient cause not to justify the additional expense of running section and township lines. The traverse of the streams was taken for the purpose of getting, as near as practicable, a correct representation of the topography of the country."

In 1852, agreeably to the provisions of the act of Congress of 1849, relative to "swamp and overflowed lands unfit for cultivation," the lands included in the examination and partial survey so made were selected by, and approved to, the state of Louisiana, according to a list upon which the numbers of the sections were given and each section was credted with the full 640 acres. This list, however, contains the following statement, immediately above the signature of the officers representing the state and federal governments, to-wit:

> "The estimated areas in the foregoing list are only intended as an approximation to the true area, as, in many instances, there is not sufficent data to form a correct estimate."

The purpose of the grant, as declared by the act of Congress, having been "to aid the state of Louisiana, in constructing the necessary levees and drains to reclaim the swamp and

overflowed lands therein," the state, by Act No. 14 of 1892, created the "Lake Borgne Basin Levee District," as an instrumentality for the accomplishment of that purpose, and, directing the State Auditor and Register of the State Land Office to convey to it all the lands so acquired, within said district, authorized the board of commissioners of said district to sell the lands and apply the proceeds to the completion of a levee system. As, however, the land areas had not been calculated, either when the original examination and partial survey was made, or at any time afterwards, the fractional sections were conveyed to the board of comissioners, as they had been conveyed to the state, by their numbers and as containing, each, 640 acres. Thereafter, by private act, of date September 16, 1898, the board of commissioners made a sale, by the following description, to Charles Sanger, to-wit:

> "Fractional South half of northeast quarter and fractional south half of section 15; east half fractional southwest quarter and fractional east half of northwest quarter of section 21; all of sections 22, 27 and 28; north half of section 33, north half of section 34; containing 3,440 acres; and the south half of northwest quarter and southwest quarter of section 23; west half of northeast quarter and northwest quarter of section 26; west half of northeast quarter and northwest quarter of section 35; containing 880 acres; all stuated in township No. 11, south, of range No. 19, east, * * * and aggregating 4,320 acres, according to the plats of the U. S. Surveyor General, on file in the office of said board of commissioners. All of said lands were acquired from the state of Louiana under Act 14, approved June 21, 1892. * * * The consideration of this sale is the sum of $540.00,

cash, in hand paid. * * * It is understood that only such title is hereby conveyed as was acquired by the aforesaid act of 1892 and the deeds thereunder referred to."

In January, 1900, Sanger sold three-fourths interest in the property so acquired by him to Hunt, Forsyth and McGraw. In April, 1904, Hunt sold the interest thus acquired by him to Thompson, and in May, 1905, Sanger, Forsyth, McGraw, and Thompson sold the entire property to the defendant company. In the fall of 1908, the township in question was resurveyed, at the instance of the State Oyster Commission, and, the land and water areas having been calculated, it appears that there are 4,400 acres embraced within the description contained in defendant's title, of which 2,776 acres are land and 1,623.47 acres consist of the bodies of water, which, with the soil beneath them, are here claimed as the property of the state. We find in the record no evidence concerning the improvements referred to in the answer of the defendant. There was judgment in the district court in favor of the state, and the defendant has appealed.

Opinion.

(1) The jurisprudence of the country is now settled to the effect that, upon the acquisition of territory by the United States, whether by cession from one of the states, by treaty with a foreign country, or by discovery and settlement, the title to, and control of, all the tide lands became vested in the government, "for the benefit of the whole people, and in trust for the several states, to be ultimately created out of the territory"; that, though the United States, whilst holding territory, as such, may grant, for appropriate purposes,

titles or rights in the soil below high-water mark, they have never done so, by any general laws, but, "unless in some case of international duty or public exigency, have acted upon the policy as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of the states, respectively, when organized and admitted into the Union"; that the states admitted into the Union since the adoption of the Constitution became at once entitled to the soil under their navigable waters, the same as the original states, and that nothing therein remained to the Unted States save the public lands, which do not include lands below high-water mark; that the general legislation of Congress in respect to public lands does not extend to tide lands, but is confined in its application to lands which are subject to sale or other disposal, under general laws; that "the soil beneath the great lakes and navigable waters, above as well as below the flow of the tide, properly belongs to the states, by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water;" that the titles and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several states, subject to the rights granted to the United States by the Constituion. Martin et al. vs. Lessee of Waddell, 16 Pet. 367, 10 L. Ed 997; Pollard vs. Hagan, 3 How. 212, 11 L. Ed. 565; Goodtitle ex dem. Pollard's Heirs vs. Kibbe, 9 How. 471, 13 L. Ed. 220; United States vs. Pacheco, 2 Wall. 587, 17 L. Ed. 865; Barney vs. Keokuk, 94 U. S. 324, 24 L. Ed. 225; Hardin vs. Jordan, 140 U. S. 371, 11 Sup. Ct. 808,

35 L. Ed. 428; Knight vs. U. S. Land Association, 142 U. S. 183, 12 Sup. Ct. 258, 35 L. Ed. 974; Shively vs. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; Lowndes vs. Town of Huntington, 153 U. S. 1, 14 Sup. Ct. 758, 38 L. Ed. 615; Mann vs. Tacoma Land Co., 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714; Eldridge vs. Trezevant, 160 U. S. 452, 16 Sup. Ct. 345, 40 L. Ed. 490; Gibson vs. U. S., 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996; Morris vs. U. S., 174 U. S. 196, 19 Sup. Ct. 649, 43 L. Ed. 946; Scranton vs. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; United States vs. Mission Rock Co., 189 U. S. 391, 23 Sup. Ct. 606, 47 L. Ed. 865; Hardin vs. Shedd, 190 U. S. 508, 23 Sup. Ct. 685, 47 L. Ed. 1156.

(2) It is evident, then, that the state of Louisiana did not acquire the soil here claimed which lies beneath the waters of intercommunicating sounds, bayous, creeks, channels, lakes, bays, coves, and inlets, bordering upon the Gulf of Mexico and within the ebb and flow of the tide, by virtue of the acts of Congress of 1849 and 1850, but that she acquired them, upon her admission into the Union, by virtue of her inherent sovereignty. It is said, however, that the soil in question was approved by the United States and accepted by the state, as public lands subject to such disposal and acceptance under the act of 1849, and that the state is estopped to deny her own title. But that contention is not sustained by the fact. It may be assumed that the Governor of the state notified the Secretary of the Treasury, as provided by the act of 1849, that the state was ready to defray the expense, and that the Secretary thereupon caused "a personal examination to be made, under the direction of the Surveyor General thereof, * * * of all swamp lands therein which are" (were) "subject to over-

flow and unfit for cultivation, and a list of the same to be made out," which list, according to the statute, was certified by the Surveyor General to the Secretary and, by the latter, approved. The law did not, however, require a survey; it required, merely, that the Secretary of the Treasury should cause "a personal examination" to be made of the lands, and a list of them to be made out and certified to him, and it cannot be said that a survey was made, since the surveyor states in his report that the boundary and section lines were not run, because it was impossible to extend the lines and establish durable corners, and neither from his plat nor his notes is it possible to ascertain the acreage of the land examined by him. Hence, in forwarding the list, containing merely the numbers of the sections and attributing to each exactly 640 acres, the Surveyor General added to it the statement, which we have already quoted, to the effect that the estimated areas, as there represented, were only intended as approximations, and the list was approved in that way; in as much, however, as the law authorized the conveyance to the state of *all* the "swamp and overflowed lands, unfit for cultivation," and inasmuch as the report of the surveyor showed that all the lands in the township were of that character, it was immaterial whether they were surveyed, or merely examined, and equally immaterial whether the sections contained, each, 640 acres or more, or less. The effect of the written statement, incorporated in the selection and approved, was, however, to make clear and emphasize the fact that the land areas were only approximately estimated, and that the state was not selecting, and the Secretary was not approving, as land, the entire acreage called for by the list; hence the proposition that the selection and approval included the 1,623.47 acres of tide water bottoms,

here claimed, which the state had owned, in her sovereign right, since her admission into the Union, is without support.

(3) The question which next presents itself is: What, if anything, has the state done, with regard to the tide water bottoms so acquired, to provide a basis for the claim of title and possession set up by defendant? There is no doubt that she might have taken any action in regard to them which was not repugnant to the Constitution of the United States, and the treaties and laws made and enacted pursuant thereto. The state law upon the subject of such property, however, as found in the Civil Code, reads, in part, as follows:

> "Art. 453. Public things are those, the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation; of this kind are navigable rivers, seaports, roadsteads and harbors, highways and the beds of rivers, as long as the same are covered with water. Hence it follows that every man has a right freely to fish in the rivers, ports, roadsteads, and harbors. * * *

> "Art. 455. The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like. Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands."

> "Art. 509. The accretions, which are formed successively and imperceptibly to any soil situated on the shore of a river or other stream, are called alluvion.

> The alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or stream, and whether the same be navigable or not, who is bound to leave public that portion of the bank which is required by law for public use."
>
> Art. 510. The same rule applies to derelictions formed by running water retiring imperceptibly from one of its shores and encroaching upon the other; the owner of the land, adjoining the shore which is left dry, has a right to the dereliction, nor can the owner of the opposite shore, claim the land which he has lost. This right does not take place in derelictions of the sea."

As far back as 1838, our predecessors in this court, applying the articles thus quoted, in a petitory action for the recovery of (what was called) a parcel of land upon the shore of Lake Pontchartrain, said:

> "It appears to us that the ground in question lies much below high-water mark and forms part of the bed of the lake, and is not, therefore, susceptible of private ownership." Milne vs. Girodeau, 12 Rob. 329.

In a later case, the plaintiff owned a lot situated upon the same lake shore and brought suit to be decreed the owner of the accretion, formed and to be formed, in front of it, and the court said:

> "The plaintiff, however, denies that Lake Pontchartrain is either the sea or an arm of the sea, and, therefore contends that this question of accretions or alluvion on the sea shore has no applicability to this case. It mght be a sufficient reply to this to say

> that the only acknowledged right to accretions, as property, under our law, are those formed on rivers and running streams, and that there is no recognition of any property right therein when formed on lakes, bays, arms of the sea, or other large bodies of water, and that the modes or ways of the acquisition of property are limited to those expressly prescribed by law, and cannot be extended by implication. But we consider this question virtually disposed of in the case of Milne v. Girodeau, 12 Rob., 329 * * * Zeller vs. Yacht Club, 34 La. Ann., 839.

In a still later case, in which the plaintiff was asserting title to water bottoms in the same peninsula in which those involved in this suit are situated, the opinion of the court contains the following language:

> "We conclude, then, that the grants under which plaintiff claims—being of land bordering upon, and partially surrounded by, the tide waters of the Gulf of Mexico—carry its titles no farther than high-water mark, and that, in so far as it (plaintiff) asserts ownership and possession, under such titles, of land lying beneath the waters which surround the tracts of dry land included in said grants, or lying beneath any navigable passes or channels which intersect such tracts or separate them from each other, the exception of no cause of action was properly maintained."
>
> Louisiana Navigation Co. vs. Oyster Commission, 125 La. 740, 51 South. 706.

(4) There has been considerable legislation, bearing, to some extent, upon the questions here presented, since the Civil Code was adopted; but it will be sufficient for the purposes of this case to inquire into the state of the law at the

time that defendant's author made his purchase, i. e., on September 16, 1898.

Act 106 of 1886, p. 195, is entitled and reads, in part, as follows:

> "An act to encourage, protect, regulate and develop the oyster industry in the state of Louisiana, and imposing penalties for the violation of the provisions of this act."

> "Section 1. * * * That all beds of the rivers, bayous, creeks, lakes, coves, inlets and sea marshes, bordering on the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of this state, and not heretofore sold or conveyed, by special grants or by sale by this state or by the United States, to any private party or parties, shall continue and remain the property of the state of Louisiana, and may be used for the purposes of fishing and taking and catching oysters and other shell fish, subject to the reservations and restrictions hereinafter imposed, and no grant or sale or conveyance shall hereafter be made by the Register of the State Land Office to any estate, or interest of the state, in any natural oyster bed or shoal, whether the said bed or shoal shall ebb bare or not.

And then follow a number of sections purporting to regulate the disposition of oyster bottoms, or beds, and the cultivation, catching, and sale of oysters.

As we have already stated, in 1892, the General Assembly created and delimited the Lake Borgne Basin Levee District (including therein the parsh of St. Bernard) and established,

as a body politic, a board of commissioners for its governance. Section 11 of the act provides, among other things:

> "That, in order to provide additional means to carry out the purposes of this act, * * * all lands now belonging or that may hereafter belong to the state of Louisiana and embraced within the limits of the levee district as herein constituted shall be, and the same are, hereby, given * * * and delivered unto said board of commissioners of the Lake Borgne Basin Levee District, whether said lands or parts of lands were originally granted by the Congress of the United States to this state or whether said lands have been or may hereafter be forfeited to, or bought in by, or for, or sold to, the state at tax sales, for non-payment of taxes. * * *"

Acts No. 110 of 1892, p. 142 and No. 121 of 1896, are framed upon the same lines and will be more particularly referred to hereafter. Other acts upon the same subject and containing the same reservations were passed in 1904, 1906, 1908 and 1910; and, in the year last mentioned, there was a special act passed reading as follows, to-wit:

"Act No. 258.

"To declare the waters found in the bayous, lagoons, lakes, bays and rivers of the state to be the property of the state and the beds thereof.

"Section 1, * * * That the waters of and in all bayous, lagoons, lakes and bays and the beds thereof, within the borders of the state, not at present under the direct ownership of any person, firm, or corporation, are hereby declared to be the property of the state. There shall never be any charge assessed

against any person, firm or corporation for the use of the waters of the state for municipal, agricultural or domestic purposes.

"Section 2, * * * That, while acknowledging the absolute supremacy of the federal government over the navigation on and in the navigable waters within the borders of the state, yet, nevertheless, it is hereby declared and affirmed that the ownership of the water itself and the beds thereof in said navigable streams is vested in the state and that the state has the right to enter into possession of said waters, when not interfering with the control of navigation exercised by the federal government therein; provided, this act is not intended to interfere with the acquisition, in good faith, of any waters, or the beds thereof, transferred by the state or its agencies, prior to the passage of this act, and, provided, further that this act shall not affect the acquisition of property by alluvion or accretion."

It thus appears that, 12 years before defendant or its author acquired the interest upon the basis of which they assert title to the property here claimed, the state had enacted a law declaring, in specific terms, that that property was reserved, and that the declaration so made was twice repeated in statutes enacted prior to said acquisition by defendant's author (the one in 1892, and the other, in 1896) that, at the same session at which the state made the donation to the Board of Commissioners of the Lake Borgne Basin Levee District, of its lands in said district, whether granted by Congress or acquired through tax sales, the General Assembly enacted one of the statutes referred to, of later date than the act of donation, reaffirming the policy previously declared:

"That all beds of the rivers, bayous, creeks, lakes, coves and inlets bordering on the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of this state shall continue and remain the property of the state, * * * and may be used as a common by all citizens of the state for the purposes of fishing and taking and catching oysters and other shell fish, subject to the reservations and restrictions hereinafter imposed, and no grant or sale or conveyance shall hereafter be made by the Register * * * to any estate, or interest of the state, in any natural oyster bed or shoal, whether the said bed or shoal shall ebb bare or not; and the citizens of this state shall have the exclusive privilege to fish or take oysters in any natural bed or shoal, subject to the restrictions hereinafter imposed." See Act 110, of 1892, p. 142.

If, however, it could be supposed that the act making the donation to the Levee Board, which refers only to lands granted by Congress, and acquired through tax sales, and which became a law before the other, controlled the later enactment which we have just quoted, and which concerns lands that were acquired in neither of the ways mentioned, and we could impute to the General Assembly, as the result of construing the two acts together, the intention of saying, at one and the same session, that its tide water beds, bordering on the Gulf of Mexico, should continue and remain the property of the State, to be "used as a common by all citizens of the state," and that those same tide water beds should be placed at the disposal of the Levee Board, to be sold to the first comer, there yet remain the Act 121, of 1896, the first section of which is, totidem verbis, a reproduction of the first section

of the act of 1892, above quoted; the second section of which reads:

> "That the rights of the owner or occupant of land on any of the shores of bays, bayous, inlets and lakes shall extend to ordinary low-water mark; but it is not intended thereby to deprive them of the privilege of bedding or planting oysters, extended to all citizens of the state, under the several sections of this act and subject to the restrictions hereinafter imposed."

And Section 17 of which repeals the acts of 1886 and 1892 and all other conflicting legislation.

It is clear, therefore, that when, more than two years later, defendant's author acquired the interest upon which it relies, the board, from whom that interest was acquired, was utterly without authority to alienate the soil beneath the bayous, bays, coves, inlets, etc., and the oyster beds and shoals, which are here made the subject of dispute. Beyond that, and in order that no injustice may be done to the board of commissioners, it will be noted that the sale to Sanger was made according to the plat, prepared by the government surveyor in 1844-45, upon which plat the areas here claimed by the state are as distinctly delineated, as bayous, bays, coves, and inlets, as they are upon the map annexed to the plaintiff's petition; and though the conveyance from the board to Sanger purports to fix the acreage of the land conveyed, in spite of the fact that it had never at any time been calculated and had been merely estimated in the conveyance from the state to board, the conveyance to Sanger was nevertheless a conveyance of public lands which the state held for sale, and did not purport to be a conveyance of navigable and tide wa-

ters and water bottoms, which the state was holding in trust for all of her citizens.

It may be, and probably is, true that there is no legal impediment in the way of the state's alienating such property in favor of particular individuals or corporations, save in so far as such alienations might conflict with the power vested in Congress to regulate interstate and foreign commerce; but, as we have already seen, her declared policy has always been not to do so, and any statute or contract from which such effect were claimed would, necessarily, be strictly construed against the grantee.

In Martin et al. vs. Lessee of Waddell, supra, Taney, C. J., speaking for the Supreme Court of the United States, said:

> "We do not propose to meddle with the point, which was very much discussed at the bar, as to the power of the king, since Magna Charta, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell fish or floating fish within the limits of his grant. The question is not free from doubt, and the authorities referred to in the English books, cannot, perhaps, be altogether reconciled. But, from the opinion expressed by the justices of the Court of King's Bench in the case of Blundell vs. Caterall, 5 Barn. and Ald. 287, 294, 304, 309, and in the case of Duke of Somerset vs. Fogwell, 5 Barn. and Cress. 883, 884, the question must be regarded as settled in England against the right of the king, since Magna Charta, to make such a grant."

Considering, in the same case, the question whether the charters granted by Charles II to his brother, the Duke of York, conferred upon the latter the right to dispose, as of his private property, of the soil lying beneath Raritan river and bay, in the state of New Jersey, the learned Chief Justice said:

> "The dominion and property in navigable waters and in the lands under them, being held by the king, as a public trust, the grant to an individual of an exclusive fishery, in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant still remains in the crown, for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly, and it will not be presumed that he intended to part from any portion of the public domain unless clear and especial words are used to denote it."

Counsel for defendant seem to rely, somewhat, upon the decisions of this court in the cases of McDade vs. Bossier Levee Board, 109 La. 625, 33 South, 628, Hall vs. Board of Commissioners, 111 La. 913, 35 South, 976, and Chauvin vs. Oyster Commission, 121 La. 10, 46 South, 38. The two cases first mentioned involved the ownership of lands left dry by the reliction of non-navigable waters, in the northern part of the state, and presented question which are governed by different principles and precedents from those which are to be here decided. The third case mentioned was decided (on rehearing) in favor of the plaintiff, on the ground that the defendant was without capacity to stand in judgment for the

state with respect to the validity of the patent under which plaintiff asserted title. It was stated in the opinion:

> "The state cannot be bound with respect thereto" (referring to the title in dispute) "by any judgment which may be herein rendered, and, as between the plaintiff and the state, such judgment must leave that question entirely at large."

For the reasons thus assigned, the judgment appealed from is affirmed.

FILED.
OCT 11 1912
JAMES H. McKENNEY
CLERK

No. 40.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 261.

LOUISIANA NAVIGATION COMPANY, LIMITED,
Plaintiff in Error,

versus

OYSTER COMMISSION OF LOUISIANA, E. C. JOULLIAN CANNING COMPANY AND DUNBARS, LOPEZ & DUKATE COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.
(Third Brief.)

In Error to the Supreme Court of the State of Louisiana.

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BRIEF FOR PLAINTIFF IN ERROR.

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In Error to the Supreme Court of the State of Louisiana.

I.

STATEMENT OF THE CASE.

This is an action in trespass against parties alleged to be in combination in entering and taking property from plaintiff's lands, and for an account and special and exemplary damages against two of the parties for a specific tres-

pass on the 27th of November, 1908, and damage to plaintiff's property at that time inflicted.

The suit is for injunction and to assert plaintiff's possession and ownership of the property referred to in the petition, described as swamp and overflowed land in the Parish of St. Bernard, and for damages against the Oyster Commission of Louisiana and the E. C. Joullian Canning Company for a specific trespass on the plaintiff's land, cutting down and carrying off plaintiff's signs placed by it on said land to warn off intruders, and for an account against said defendants and the Dunbars, Lopez & Dukate Company for property previously carried off by said defendants, notwithstanding notice and complaint to the said parties that they were trespassing upon petitioner's property, and alleging an unlawful combination of the said parties to take petitioner's property and convert the same to their own use.

The allegation as to the said specific trespass is that on or about November 27, 1908, the said Oyster Commission, through its president (Dossman), *vi et armis*, entered upon petitioner's land and cut down or destroyed or carried off the signs of petitioner thereon warning parties off said land, and ordered the E. C. Joullian Canning Company, its licensee, through its boats and employees, which were taking petitioner's property, which previously had been notified by petitioner to desist from taking oysters, the property of petitioner, from its said land, to go on taking oysters on petitoner's said property, and that the said E. C. Joullian Canning Company, through its president, and by means of its boats and employees, which had left off taking the said oysters on petitioner's said notice, returned to petitioner's property and continued the said trespassing and joined with the said Oyster Commission in the commission of the said

illegal acts. The allegation is, also, that the said parties defendant have entered into an unlawful combination to take oysters in the shell and shells, and illegally load boats and barges with, and carry off, the same from petitioner's property, and convert them to their own use and profit for the purposes of their business, the said shells of which are either converted into other products or used on the marsh, piled around the establishments of the said canning companies; that the said canning companies were pretending to act, as licensees of, or taxpayers to, the said Oyster Commission of all licenses or taxes supposed to be collectible under the said Oyster Commission Act, as if the said supplies of oysters were legally taken from the public lands of Louisiana.

The petition shows that the plaintiff corporation, limited, was organized for the purpose of developing private interests as the owner of the said land, and, by the lawless acts of defendants and parties for whom they are responsible, the said Louisiana Navigation Company, Limited, petitioner, has been prevented from going on with, and illegally obstructed in, the lawful operation of its business.

Plaintiff obtained an injunction on a bond of $2,500.

II.

Our titles are questioned in argument only in utter lack of the defendants of any rights of their own—in their putting aside this difficulty, which they make for themselves, to attack our possession as if vested with a supposed protection of official position or authority, or arbitrary exercise of power, to take and remove our signs on the land (the last one of which was removed by them after suit and injunction served).

The illegal exercise of the powers of the Commission and threatened abuse (in the motion to dissolve) of criminal process against petitioner prevented petitioner from using its vessels and boats in the face of said threats possibly resulting in violence. The defendants have not changed this attitude of hostility in their pleadings, which show a combination on a common defense to have the injunction suit dismissed on demurrers or the petitioner's bond for an injunction increased to excessive figures. No answer is filed by defendants other than the argument and admissions made by their motion and demurrer.

The defendants filed exceptions of vagueness and no cause of action, and motions to dissolve the injunction, or, in the alternative, increase the bond, and went to trial on the merits on the motion to dissolve, which also contained or repeated the demurrer. The plaintiff filed a motion to take the motions for answers, praying that the motions to dissolve be treated as an answer as involving the merits of the case. (Rec., p. 22.) The lower Court, while ordering this motion to be filed and overruling this motion, went into trial of the issues and heard testimony, overruled the exceptions except as to vagueness or uncertainty of description, and the plaintiff was ordered to amend within five days. (Rec., p. 36.)

This amendment was filed by plaintiff in an amended and supplemental petition, in which it recited very fully and by reference to original patents and maps the area and boundaries as corresponding to the State patents and Government surveys and plats, etc. Exceptions of no cause of action were again filed, and on further proceeding the Court sustained the exceptions and dismissed the plaintiff's suit.

The motion to take the rules to dissolve and exceptions as an answer had the effect of bringing the whole case be-

fore the Court on the trial of the motion to dissolve, or, in the alternative, increase, the bond for injunction; and, on evidence adduced by defendants which plaintiff considered irrelevant or not calling for rebuttal, as practically admitting all the allegations of its petition, the Judge *a quo* immediately ordered an increase of the bond by $10,000, or a bond, in all, of $12,500, within forty-eight hours. The plaintiff offered to appeal, and, when it was called to the Court's attention that the motion to dissolve for want of right to the injunction, and to dismiss the suit, only called for additional bond in the alternative that the motion to dissolve was not granted, the Court, *ex proprio motu*, rescinded the order for $10,000 additional bond, and the motion for appeal was not pressed. When again the case was taken up for trial the exception of no cause of action had been filed to the supplemental petition, and the Court was inclined to dispose of the case finally as containing only this question of no cause of action or right to injunction, and in order to obtain the opinion of the Supreme Court on the issues presented and the evidence, and maintained the exception. The printed record of the *Boundary case* had also been introduced in evidence by agreement of counsel, and was made part of the transcript of appeal. A suspensive appeal from the judgment was allowed, and a final decree was pronounced by the Court through Monroe, Justice, as the organ of the Court.

No answers were filed, although the case was three times up for trial; but it is understood and disclosed by the motions to dissolve that the defendant the Oyster Commission and the other defendants, licensees, claim exclusive right to take oysters in the shell or otherwise wherever found, whether from natural reefs or private bedding-

grounds or privately-owned oyster properties—"if th[ere be such, which appearer denies" (motions to dissolve an[d dismiss, Rec., pp. 12, 13, 14), and that oysters, wherever f[ound, are subject to their exclusive control and possession under penalties of criminal offense against petitioner und[er the said Oyster Commission Act. This denial or join[der of issue is extended and set out in detail in the motions [to dissolve the injunction filed severally by the defendant[s, but uniting in a single purpose on the common issue. Th[e motions to dissolve are substantially alike, so that the mot[ion of the Oyster Commission is here reproduced as a samp[le for all, as follows:

> "Comes the Oyster Commission of Louisian[a, one of the defendants in the above numbered and e[ntitled cause, and shows to the Court that the order e[ntered for the issuance of the injunction herein was im[providently granted.
>
> "It shows that the amount of bond fixed b[y said order, and which was given by plaintiff, is [totally inadequate to secure the damages which will [accrue to appearer or appearer's codefendants herein.
>
> "It shows that it derives the following re[venue from the oyster business and industry in the [territory covered by plaintiff's injunction, and th[at can- neries and shucking establishments which [obtain their oysters from said territory—viz.: Pr[ivilege tax upon oysters, $8,681; canners' licenses, [$300; shop licenses, $85; scrapers' licenses, $675; [vessel licenses, $825; making a total of $10,567; [all of which is collected during each oyster season, [which begins about October 15th and ends about [April 15th each year.
>
> "It shows that the effect of the injunction [herein issued has been to practically paralyze the oys[ter in- dustry in the said territory, and to prevent app[earer from collecting the revenues set out above.

"It shows that, before this cause can be finally heard and determined, the oyster season will be over and the above amount of revenue will be entirely lost to this appearer, and that it will be damaged thereby in that amount.

"It shows that said injunction prevents this appearer from collecting the tax of three cents per barrel imposed by law upon all oysters fished in Louisiana waters, whether fished from natural reefs or from private bedding-grounds or privately-owned oyster properties (if there be such, which this appearer denies).

"It shows that said injunction prevents appearer from enforcing the criminal laws of the State of Louisiana in reference to the oyster waters and industry, and from causing the arrest, prosecution, conviction and punishment of those who may break said laws in the territory covered by the injunction herein issued (which it is its duty to do) if said persons should happen to be in the employ of plaintiff, or if the vessels breaking such laws should be owned, chartered or operated by said plaintiff or anybody in its employ.

"It shows that said writ of injunction is an attempt to prevent the enforcement of the criminal statutes of the State of Louisiana by the department of the State Government upon which, by law, devolves the enforcement of said statutes, by means of an injunction from a Court of purely civil jurisdiction.

"It shows that the allegations of the petition and the terms of the injuntion herein issued are too vague and indefinite as to the property with which appearer is enjoined from interfering to enable appearer, its agents, officers and employees, to know what land is meant, or with what property they are enjoined from interfering, or granting leases on. It shows that the places known as 'Creole Gap' and

'Grand Pass' (the only places mentioned in the writ of injunction served upon it) are bodies of water, and not land, being a part of the Gulf of Mexico, connecting said gulf with the body of water known as 'Mississippi Sound,' both of which bodies of water are a part of the high seas, and not subject to private ownership, and which to said named passes or gaps are navigable channels connecting said gulf and sound, and which are not susceptible of private ownership.

"It shows that the waters of Creole Gap and Grand Pass contain natural oyster reefs, where oyster grow naturally, and that same are, and have been for many years, reserved by law for public use, and are reserved from private ownership, and that appearer is charged with the custody and management of same by the laws of Louisiana.

"It shows that none of the titles of petitioner cover anything except land, same being for certain fractional sections of land, and that the surveys and maps thereof, made by the United States Government, were adopted by the State of Louisiana, and that all titles by the State of Louisiana to all lands in that region are made according to such surveys and maps, and only to lands, specially exempting and reserving from said titles all waters, as shown by the area of the lands set forth in said titles and by the maps showing the waterline. That plaintiff has, therefore, no right to an injunction prohibiting appearer from in any manner managing and controlling the waters of the said territory and the oyster reefs and bottoms under said waters, same not being covered by any title held by plaintiff.

"Wherefore, appearer prays that this Court issue a rule, to the said Louisiana Navigation Company, Limited, directed, commanding it to appear in this court on Friday, January 22, 1909, at 11 o'clock a. m., and show cause why said injunction herein

issued should not be dissolved and set aside, and, in the alternative, why said plaintiff should not be required to furnish bond herein in favor of this appearer in the sum of fiften thousand, eight hundred and fifty-one dollars ($15,851), and, failing to furnish said bond, that said injunction be dissolved and set aside.

"Appearer further prays that upon the trial hereof this rule be made absolute, and said injunction be dissolved and set aside, and, in the alternative, and only in the event that the foregoing prayer be refused and denied, that plaintiff be required to furnish bond in the amount and as set out above, and, failing to furnish same, that the injunction herein issued be dissolved and set aside.

"JNO. C. WICKLIFFE,

"Attorney Oyster Commission of Louisiana."

The judgment was a final judgment on the merits of the case. The Court below could not avoid the consequences of its previous ruling and reconsider exceptions of no cause of action which had been previously overruled when the plaintiff was ordered to amend on the exception of vagueness. the Court at the time holding that the case showed a cause of action, and overruling the exception of no cause of action, and permitting the plaintiff to amend its petition. The exception of no cause of action was no proper plea to an action of trespass or ejectment. The conclusion of the lower Court to dismiss the plaintiff's case was one, therefore, which could only be reached at a trial of the case on the merits. It would serve no useful purpose to try over again a case which, as the evidence shows, was tried and dismissed.

We have occasion to complain of the irregularity of proceeding by which this conclusion was reached after the exceptions of no cause of action had been previously disposed of and overruled. The exceptions were overruled and the petition amended as to alleged vagueness of description of the property. But, as the injunction stands and was saved by suspensive appeal to the Supreme Court of Louisiana, we believe the decision of the case is advanced more rapidly over the lower Judge's actions than it would have been otherwise.

Hart vs. Judge, etc., 34 An. 1210, and authorities cited.

> "When the Supreme Court reverses the judgment of an inferior Court, it shall pronounce on the case the judgment which the lower Court should have rendered, if it be in possession of all the facts and testimony to enable it to pronounce definitively."
>
> C. P., Art. 905.

> "But, if the Court shall think it not possible to pronounce definitively on the cause in the state in which it is, either because the parties have failed to adduce the necessary testimony or because the inferior Court refuse to receive it, or otherwise, it may, according to circumstances, remand the cause to the lower Court, with instructions as to the testimony which it shall receive, to the end that it may decide according to law."
>
> C. P., Art. 906.

This is a suit by injunction to restrain the defendants from interfering with plaintiff in the possession and enjoyment of certain lands or water bottoms purchased by plaintiff from parties who, themselves or their authors, acquired directly from the State of Louisiana by patents appearing in the printed record (p. 82 *et seq.)* under the

operation of the acts of Congress of the United States making donations of swamp and overflowed lands to the several States.

The disturbance of possession has arisen in connection with the circumstance of the waters overflowing these lands, making them available at times, under the natural conditions recurring, for the growth and cultivation of oysters. The lands are entirely fresh-water alluvion or alluvial, and afford ready material for the production or formation of shell material under certain condition of solution of the waters. At times and places, these conditons not existing or concurring, no oyster or shell production or accumulation occurring, there is no incentive to third parties to visit these lands, and no disturbance of possession occurs; but, where the oyster formation happens to occur, the open seasons provided by the oyster laws of the State are made the occasion for descents upon the property of the plaintiff in error under the invitation and personal sanction of the Oyster Commission, defendant, as shown in this case. The Oyster Commission takes advantage of the opportunity to levy contributions upon small craft of every description invited from everywhere under pretense of granting licenses and collecting taxes graded to the quantity of oysters taken by these alleged intruders. The canning companies, defendants, are alleged to be concerned in taking part in these alleged illegal acts, both in having boats taking oysters and buying and loading on barges anchored outside these waters and coast line the oysters alleged to be unlawfully taken from the plaintiff's possession, these barges being towed by steam tugs to canneries and brought back empty.

These parties are alleged to be in unlawful combination to deprive plaintiff of the fruits and revenues of its

property and the peaceable enjoyment and possession or ownership of the lands in question, and inflict irreparable injury and loss upon plaintiff.

The particular acts of depredation complained of are alleged to have happened on or about the 27th day of November, 1908, and to have consisted in the unlawful entries on plaintiff's property and the cutting down and removal of plaintiff's signs and landmarks warning off trespassers, and the threatening of plaintiff and its employees with arrest and imprisonment and the seizure and forfeiture of its steamboat *Carrie* engaged in the development of the said property. These acts, which were followed by the threats and proclamations of the Oyster Commission and taking possession of the property for its own purposes, effectually deprive plaintiff in error of its property without opportunity of trial or due process of law. All these acts are sustained by the final decree of the lower Court.

These illegal acts are alleged to have been done *ci et armis* and under the leadership of the Oyster Commission, and its officers and employees, operating, as alleged, armed steam and sail craft intended for the purpose known as patrol boats, to which plaintiff or its employees had appealed in vain for the protection to which they were entitled by law. These proceedings, plainly an abuse of the powers of the Oyster Commission to oppress plaintiff and defeat the objects of its incorporation and possession as owner of the property, which warrant the injunction, it is remarkable to say, are sustained.

The error committed by the lower Court consists mainly in cutting out from plaintiff's area or holding all water spaces, spots or wet places on which, presumably, oysters could be found or promoted in growth under natural conditions, and on which these depredations could be practiced

in praesenti or *in futuro*, and denying to plaintiff the protection of law to prevent the dismemberment and destruction of its property as an integral unit of value, and the invasion of plaintiff's property by an unlawfully-organized force hostile to plaintiff's interests.

It appears by direct statute that the Oyster Commission is prohibited from attacking or calling in question titles derived from the State, and by her derived from the General Government, as are the titles or patents shown by plaintiff in this case. The act creating the Oyster Commission (Section 10 of Act 178 of 1906, page 323) provides:

> "The Commission shall have power to lease any water bottoms in the State, * * * as described in Section 1 of this act, and the title whereof is vested in the State, and is not claimed under some title by any person; and no lease of any bottom which may be claimed by any private individual, firm or corporation shall be valid or have any effect until there shall have been an adjudication by a Court of competent jurisdiction between the State and the claimant as to the validity of the title to be leased."

The Supreme Court of Louisiana has disregarded this prohibition, and has given to the statute the effect to impair the obligation of contracts, evidenced by the patents to the lands from the State, and deprive plaintiff of its property without due process of law and in violation of the rights of plaintiff to engage in commerce and its rights as a citizen under the exclusive dominion of Congress over interstate commerce and the articles of the Constitution of the United States set out in its complaint.

The threats of intimidation, violence and arrest and imprisonment aimed at plaintiff and its employees by an armed force on boats, carrying armed preparations for war,

to prevent the peaceable operation of plaintiff's boat, and its access to and departure from its property in pursuit of its business, constitute an abuse of the powers of the Oyster Commission in conection with the institution of a patrol system for which said fleet was designed, and a conversion of a patrol force or fleet into a navy for warlike purposes, in violation of the article of the Constitution of the United States prescribing that no State shall keep troops or ships of war in time of peace.

Art. 1, Sec. 10, par. 3, Const. U. S.

It is well understood that water is necessarily indispensable to navigation, but not navigation to water wherever it happens to spread or be contained.

It is inconceivable how the Court could have reached a decree of this character, on the extent of the doctrine of "navigable waters," so destructive of rights of ownership of lands as to cut out the portions or spaces referred to in its decree and destroy the land in its entirety for purposes of private ownership so completely as to render the property *res nullius* or insusceptible to private ownership, and open to intrusion from all sides by every description of characters, according to the decree, were it possible so to subdivide. When the Court cut out these spaces it attacks collaterally our title, and leaves nothing remaining were we able to dispute for possession or recognition for the remaining part after the partition of the property. In the dismemberment or separation ordered by the Court the judgment also defeats itself as too vague and insusceptible of execution in kind to be carried out in practice, yet remaining a final judgment, all the while dispossessing us of our property, or leasing it out to others. If susceptible of lease, it ought to be susceptible to ownership.

The circumstance that the property is shown to be valuable by the defendants in their motion to dissolve the injunction, on which the case went to trial, shows the substantial character of our interest and the extent of loss sustained beyond the amount that we would have claimed in damages. The motion to dissolve contained also, in duplicate, the sense of the demurrer (brief, pp. 6-9), previously overruled, "no cause of action or right to injunction," so that it can be presumed that the lower and upper Court decided both on the law and the facts after taking testimony and introduction of evidence contained in the record. (Testimony, note of evidence, pp. 23, 32; agreement of counsel, p. 97; maps, p. 95, printed record; original No. 11; boundary suit, printed record, two volumes.)

Justice Field, as the organ of the Court, in *Commissioners, etc., vs. Lucas, Treasurer*, 93 U. S. 113, says:

> "The course adopted in this case was evidently pursued from the fact that the whole merits of the controversy had been considered on the motion for preliminary injunction."

Cited in previous brief, pp. 8, 9.

Specification of Errors.

The opinion is in error in calling Creole Gap "Creole Pass," and also in omitting Mississippi Sound on the north and Chandeleur Sound on the east on its map.

It gives as the opinion of the Court: "Hence there can be no such thing in this State as private ownership of the bed of a navigable river, and *a fortiori* can there be no such thing as private ownership of the bed of the sea or of an arm of the sea," conditions which we have shown are misapplied

and do not exist in fact or fit our case. We produce our patents and the approval to the State of the same lands under the acts of Congress donating and dedicating these lands for reclamation or levee and drainage purposes, as importing a *prima facie* case that these objects and purposes cannot be diverted by subsequent legislation claiming these lands under any other designation than the title under which the State holds them from the United States, and under which they have been approved to the State as swamp and overflowed lands.

> Revised Civil Code of Louisiana, Art. 658, 509, 510, etc., quoted in Brief, p. 71.

When the States were admitted to the Union it was on the express condition that they renounced claim to lands, and that said lands were surrendered to the United States. This is a condition of the Constitution, of the acts of Congress and the Constitution of the United States providing for the admission of the several States. The State of Louisiana by her Constitution, which was accepted or ratified by Congress, accepted these conditions, and also the conditions that all waterways that were navigable and their banks should remain open for passage and navigation. These lands were subject to no other restrictions, and became subject to the operation of the laws and usages and customs previously prevailing in the Province of Louisiana by express enactment of the treaty obligations under Section II, Article IV, of the Constitution of Louisiana of 1812, under which the State was admitted into the Union; and the provision in the same Constitution, and perpetuated in every subsequent Constitution, that no system of code of laws should ever be adopted by general reference to the said

system or code, but in all cases shall specify the several provisions of the law it may enact.

> Constitution of 1898, Art. 33; La. R. C. C., Art. 665 (661); *Eldridge vs. Trezevant*, 160 U. S. 452; Farnham on Waters, Vol. I, pp. 244 to 249.

The oyster acts precipitated upon this State were taken bodily from the law of Virginia, or a common-law State, and introduced a system of labor and a pretended right of common extending over the whole territory in one of said acts, repealed Act 106 of 1886; and the present legislation Act No. 52 of 1904, under which the said Oyster Commission is organized, and the amending Act No. 178 of 1906, and later act, Act No. 189 of 1910, lacking an enacting clause possibly, and therefore ineffectual as a repeal or amendment act, instituting the Bird, Game and Fish Commission in place of the Oyster Commission, introduced conditions divesting plaintiff's vested rights without compensation, and impairing the obligation of contract in violation of Article I, Section No. 10, and other articles of the United States Constitution and the acts of Congress dedicating these lands for a special purpose, all of which provisions we are entitled to the protection of, as bound up in our titles importing a *prima facie* case against attacks from any source. (Petitions and assignment of errors, pp. 37, 66, 69, 75.)

The provisions of the land laws (Section 2476 of the United States Revised Statutes, page 456) are uncontradicted and clear on the subject of highways, navigable streams and riparian or owners' rights.

> "SEC. 2476. All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where

> the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."
>
> U. S. Rev. Stat., Sec. 2476, p. 456.

In *Yates vs. Milwaukee*, 10 Wall. 497, the Supreme Court of the United States, through Mr. Justice Miller, said:

> "Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor, * * * subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be. * * * This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

The first section of the Oyster Act of 1904, providing for a common, creating the Oyster Commission and establishing it into a "department of the State Government," is clearly subject to these objections; and also in repealing the previous provisions, recognizing exclusive right of private owners.

Act No. 52 of 1904, Secs. 1 and 2.

The system introduced is contrary to the Federal system in calling the Oyster Commission a department of the State Government, literally contrary to the republican form of government, as well, as actually unconstitutional, in vesting this Commission with absolute powers contrary to

the regular subdivision of the powers of government into executive, legislative and judicial.

It serves to show the extravagance of the claims that can be made by the Commission on the subject of "Fish and Fisheries," which on the Atlantic coast, at places under the specious doctrines advanced, had been protected to such an extent (partly the result of original judicial misconstruction) as to become an abuse of the powers of the Government.

All this section is alluvial, and in no sense seashore, parts having no shore at all but the edge of alluvial marsh, and all constituting part of the delta of the Mississippi River. It is formed by a confluence of fresh water, which is never entirely drained by any subsidence of tide. This country is pure alluvion, and subject to heavy rainfall and overflow, containing always quantities of undrained fresh or rain water, resulting at points in conditions favorable to the growth or fattening of oysters. The whole area is subject to the doctrine of riparian rights, and any attempt, therefore, to change the operation of the laws of Louisiana as to titles to these lands by means of the collateral intervention of an oyster act, purely limited to conservation of natural or outlying oyster reefs, or from judicial construction, would not only be illegal, but inoperative, as repealing the land laws of the United States and State of Louisiana, and in violation of the constitutional provision prohibiting the divesting of vested rights and impairment of the obligations of contract.

The whole territory, then, is subject to reclamation and the operation of the general laws protecting rights of property, and is in no sense seashore; and in this connection it is not significant whether we are the owners of any water bottoms or not, as it will be time to consider this

question when conflict actually arises between us and the General Government or the State, as no rights of sovereignty are in dispute. Our title and possession cannot be called in question collaterally by the Oyster Commission or their successors, the Game Wardens of Louisiana. These principles are recognized by the oyster acts themselves, and have been given force by decrees on the subject in reference to the territory in question.

Morgan vs. Nagodich, 40 An. 246.

The insane passion to attack vested interests in order to extend the powers of State control, at the instance of overzealous or officious people, only tends to increase confusion where private rights are concerned.

These lands would be stripped of their emoluments by the repeal of riparian rights or the confusion of the said rights with the rights of fisheries. As far as oysters are concerned, these laws apply only to outlying shoals or reefs, of which there are an abundance spread over the sound and waters of Southwest Pass of Cat Island and Chandeleur Sound, which are strictly the only navigable waters, in the sense of regular navigation, in the neighborhood. We find in the State of Mississippi, where, under common law, rights are not so clearly recognized, that the front owners are recognized for 1,500 feet, or to the channel. There is, therefore, no reason why our possession under the laws of Louisiana should be disturbed and the organized and overwhelming invasion of our property and the taking of its products and destruction of every indicia of our possession should be permitted, and not stopped by injunction.

Morgan vs. Nagodich, 40 An. 246.

The judgment of the State Supreme Court, the highest Court of the State which could pass on the question, is in-

disputably final on the constitutional issues, and is particularly final as relates to the subject of the Federal question and jurisdiction and protection which we have invoked.

It is nowhere declared in the general law that oysters are *per se* or intrinsically common property of mankind, and the circumstance that the supply found in our lands is necessarily local and limited in quantity, and not inexhaustible, as air, flowing water or running fish, etc., is evidence that objects and facilities of this nature are emoluments of the land which are indissoluble from ownership without consent.

The case presented against us is, in the language of the opinion of the State Supreme Court (Rec., pp. 56, 60):

> "Counsel for the Oyster Commission relies upon two grounds in support of his exception [of no cause of action]. He says in his brief: 'The first ground is that, this being a suit to test the title of lands claimed both by the plaintiff and the State, the Oyster Commission, being merely a department of the State Government charged with certain functions, cannot stand in judgment in a suit concerning the title, that belonging to the State; and the State, therefore, is the only party who could try this question with the plaintiff.'
>
> "The other ground (relied on by all the defendants) is that the submerged lands are not included in plaintiff's patents, and that, having exhibited those muniments of title as part of its allegation of possession as owner, plaintiff has put itself out of court.
>
> "Considering the ground first stated, it would hardly do to say that, because an alleged trespasser is without capacity to stand in judgment with respect to the title to the property trespassed on, the party claiming to be in possession as owner has no standing to protect such possession.
>
> * * * * * * *

"The other ground relied on presents the question whether the patents exhibited by the plaintiff now before the Court conveyed the property which plaintiff is seeking to protect, or whether that property is part of the public domain, the administration of which is vested in the Oyster Commission.

* * * * * * *

"We conclude, then, that the grants under which plaintiff claims—being of land bordering upon, and partially surrounded by, the tide water of the Gulf of Mexico—carry its titles no farther than high-water mark, and that, in so far as it (plaintiff) asserts ownership and possession, under such titles, of land lying beneath the waters which surround the tracts of land included in said grants, or lying beneath any navigable passes or channels which intersect such tracts or separate them from each other, the exception of no cause of action was properly maintained."

In the boundary case of *State of Louisiana vs. State of Mississippi*, 202 U. S. 1, the patents of plaintiff were introduced by the State of Louisiana and depended upon to show her position without reservation or question of any kind. The Oyster Commission and State are therein concluded, both by the facts and the law, by our ownership and possession, which it was their purpose to defend. The importance of our possession to the business which they are attempting to involve the State in has excited their cupidity to dispossess us by force and deprive us of the benefit of that decision declaring the land a continuous body and extending the boundary to the thread of the main channel, Cat Island Pass. Under cover of the decree of the highest Court of the State we are ousted practically from possession and enjoyment of the whole property represented by our

patents, calling for six thousand acres or more. The opinion, in excluding us from indivisible parts of the thing as a whole, deprives us of the benefit of that decision declaring public policy and protecting our patents and the only rights of navigation and fishery, on which they pretend to depend, of which there is any evidence in this case.

The effect of the judgment is to put it into the power of the State or Oyster Commission to stop our boat, and, under fear of arrest and imprisonment, deny us due process of law and the equal protection of the laws and to regulate commerce and navigation contrary to law.

Constitution of United States, Art. I, Sec. 8, par. 3, and Art. XIV, Sec. 1, of Amendments of Constitution of United States.

There was nothing said as to the alleged "doctrine of foreshore," or "rights of State sovereignty," at that time, as affecting our titles. These are features of the case which have since been discovered or invented by defendants' counsel, one of whom, as attorney for the canneries, was associated in that case. The doctrine of foreshore, or space between high and low water mark could not figure, as the Oyster Commission Act, by its text, carried the land to low-water mark. On this question of alleged State sovereignty, confused in this country with that doctrine, the leading case shows that it was dependent on the common-law system introduced by provisions of the Constitutions under which the States were admitted into the Union, and unnecessary.

In the case of *Pollard's Lessee vs. Hagan*, 3 Howard, 212 (Angell on Tide Waters, p. 114), there was no question, as the title was annulled as a grant by Spain after the United States had taken possession of the country.

The doctrine of foreshore, or *jus privatum*, relates to

private property of the Crown, as distinguished from sovereignty rights in trust for the people. There is no dispute as to rights of sovereignty, which are political rights, and, whether in the United States or the State, are equally conceded as not affecting land titles from the respective sovereigns.

We can say the same as to the alleged doctrines of foreshore, which, in large measure, are obsolete or form the cobwebs of the common law, as having no application in this case and involving confusion at this day. The claim of the Stuart Kings of England, originating the claim of the Crown to the foreshore, or space between low and high water mark, has been abandoned in England, and was never applicable in this country, especially on the shores of the Gulf of Mexico, where there is little or no tide of consequence, and least of all in Louisiana, under the civil law always prevailing.

Farnham on Waters, Vol. 1, pp. 188, 189, 190:

> "As to actual foreshore, "* * * there was no authority for the *prima facie* doctrine, except *Philpot's case*, which had never been acted upon. It thus appears that, * * * with very few exceptions, the riparian owner had established his title to the shore against the most strenuous attempts by the Crown to recover portions of it, and that the doctrine of *prima facie* title in the Crown was invented for the purpose of giving the Crown a standing in court upon which he might succeed in getting possession of some portions of the seashore through the inability of the nominal owners to establish their titles. This is a species of oppression which little comports with the principles which should actuate the dealings of an enlightened nation with its subjects."

It appears from the geographical survey and topography of this section that the territory forms a part of the

Mississippi River delta, and is entirely alluvion and subject to the laws of accretion and riparian rights of front proprietors according to the laws of Louisiana, or the civil law, which is the original or fundamental law of all general principles upon this subject, and is fully enunciated in the provisions of the Louisiana Civil Code. The Southwest Pass of Cat Island is the continuation of the deep-water channel, or river, of which the Lake Borgne and Mississippi Sound waters are merely an enlargement, of shallow surface, and continue subject to the doctrine of accretion, alluvion and riparian rights on the Louisiana side.

In the *Boundary case*, 202 U. S., Chief Justice Fuller adopts and recognizes this view and these relations to the Louisiana side, and says:

> "Questions as to the breadth of the maritime belt or the extent of the sway of the riparian States require no special consideration here. The facts render such discussion unnecessary."
>
> *Louisiana vs. Mississippi*, 202 U. S. 52.

> "The southern portion of Louisiana is geologically of an alluvial formation, containing the delta of the Mississippi River. The peninsula of the Parish of St. Bernard is practically of this delta formation."
>
> *Ibid.*, 202 U. S. 48.

> "In the disputed area of to-day are included lands and waters located in various townships, all of which are enumerated in the Southeastern Land District of Louisiana, East of the Mississippi. The lands in these townships were surveyed by the Government about the year 1842, all of them as being in and forming a part of the State of Louisiana. By the swamp-land grants of 1849 and 1850, the United States granted to certain States the swamp and overflowed lands within their respective limits in order that these lands might be reclaimed, protected from

> overflow and brought into use. Louisiana made application to the United States for the approval to her of these lands as being part of her territory and situated within her limits. They all lay south of the deep-water channel, and were all approved to the State of Louisiana May 6, 1852. They were then offered by the State, through the Register of the State Land Office, for sale, and many sales of them were made from time to time to individuals, and patents issued therefor, in various years from 1853 to 1894. * * * Isle à Pitre was composed of certain enumerated sections of Township 10 S., Range 20 E., and these lands were approved to Louisiana by the Commissioner of the General Land Office of the United States May 6, 1852, as forming part of that State, and they were subsequently patented, sold and conveyed to various individuals, the chain of title extending from 1852, a period of over fifty years. The lands forming Isle à Pitre have been paying taxes to the State of Louisiana for years."
>
> *Louisiana vs. Mississippi*, 202 U. S. 54, 55.

The subject of the unity or continuity of this whole area as land was considered in the *Boundary case*, above cited, in which it was said:

> "Mississippi denies that the peninsula of St. Bernard and the Louisiana marshes constitute a peninsula in the true sense of the word, but insists that they constitute an archipelago of islands. Certainly, there are in the body of the Louisiana marshes or St. Bernard peninsula portions of sea marsh which might technically be called islands, because they are land entirely surrounded by water, but they are not true islands. They are, rather, as the Commissioner of the General Land Office wrote the Mississippi Land Commissioner in 1904, 'in fact, hummocks of

land surrounded by the marsh and swamp in said townships.' "

Louisiana vs. Mississippi, 202 U. S. 45, 46.

A purchaser of State land covering water navigable or otherwise takes it with its advantages and disadvantages, and is not permitted to complain or recover a proportion of the price for the part under water. The rule is that he purchases it in its entirety, and the advantages may more than outweigh the disadvantages. It is a poor rule that will not work both ways.

Board of Commissioners Caddo Levee District vs. Glassel, 120 La. 400.

Much less could the State divest him by the exercise of arbitrary power or prevent the development of the natural resources of the place and its situation for employment of the land and water for the production of oysters or lease to private parties these privileges. To do this would cut him off from his riparian front, a thing which he could not do himself to the land, as Justice Taney very properly argues in *Martin vs. Waddell*, 16 Peters, 345. There could be no severalty of his waterfront from the shore.

It is recognized by recent authorities that private ownership is the only hope for the future of the oyster industry, and that this species of title is the only assurance for successful operation and production; and has always been in practice, acknowledged and recognized under the system of the land laws and general principles prevailing in Louisiana, where these rights are taken notice of and construed under the general laws.

A. T. Hadley's Economics, pp. 129, 130, Sec. 144.

It is an abuse of the power of the Oyster Commission to attack private interests. A labor class mostly foreign, who have endeavored to keep this country as a common for their own countrymen, and the canning companies become the beneficiaries under this pseudo-legal protection, and keep up a monopoly at the expense of the consumer and private owners.

The destruction of private-property interests by legislation or prejudice is fast depriving society of protection, and the people, in whose name it is claimed to be done, of the opportunities of individual life and employment. Were it not for the protection of the Courts, private ownership of the people would be destroyed. We would be obliged to throw up our titles after long years of possession did we not believe it our duty, from motives of patriotism, to seek protection of the Courts.

In any case, the owner is entitled to the beneficial results while he supports the burden of the easement of the public. This same public could not make the condition of ownership of the land more onerous than law and natural consequences of the situation impose. The owner is not called on to sacrifice his waterfront to the convenience of private parties enjoying public rights who may come and take the property or other products for their own use. The public in a body cannot get oysters and do not want the oysters, in the nature of things, and this condition prevails in his favor, and against all third parties, whether the land is on the shore or at the bottom of the riparian. Lateral contact is as good as vertical for protection, and is only assured by vertical contact. (Am. & Eng. Enc., *verbo* Navigable Waters; *State vs. Shaw*, 60 L. R. A. 491; *"Qui sentit onus sentire debet et commodum."*) These principles are undisputed by any issues of fact or law argued in the case.

We claim the products of the land both within the limits of our survey and as riparian proprietors for the perimeter of our land.

The various oyster acts undertake to protect the rights of front proprietors for the exclusive privileges for oysters of their waterfronts and waters making into or through the bodies of their lands derived from the State. The said rights are part of the possession and property of plaintiff, and could not be divested or impaired or destroyed by legislation of the various oyster acts, if in conflict, without violation of law and the provisions of the Constitution of the United States, Article 1, Section 10, prohibiting the State from passing laws divesting vested rights and impairing the obligations of a contract.

> Section 2 of the Oyster Act, Act 106 of 1886, p. 195; Act 110 of 1892, p. 195; Act 121 of 1896, p. 170; Oyster Commission, Act 153 of 1902, p. 274; Oyster Commission, Act 52 of 1904, p. 113; act amendatory thereto, No. 178 of 1906, p. 317; and Act 189 of 1910.

Nor could a State prevent the navigation of plaintiff's vessel, the steamboat *Carrie*, regularly enrolled and licensed for the coasting trade, and engaged in commerce and navigation between Mississippi and Louisiana; nor impose a duty on tonnage, nor export duties on oysters or other Louisiana products, as attempted by the Oyster Commission, as appears in defendant's pleadings; nor keep troops or ships of war in time of peace.

> Constitution of United States, Art. 1, Sec. 10, pars. 1, 2, 3.

The people of Mississippi have a right to receive transportation of oysters in the shell from our property. The

common waters of Mississippi Sound wash these shores and contribute to the growth of oysters, etc., and one side of the boundary should not be denied commerce with the other which Louisiana enjoys. Under pretense of returning the shells to the bottom, this is prohibited. Oysters in the shell can be shipped from other points in Louisiana, under the act, after payment of the tax. Nor is plaintiff subject to taxation or license under the Oyster Commission Act otherwise than as a private interest disposed to make a voluntary contribution for patrol work, or supposed protection, beyond the protection of the law usually afforded by ordinary process.

ARGUMENT.

The controversy in this case is over oysters contained in plaintiff's land or waters making into or running through it.

> "In the origin of society we have seen that all things belonged to all men by a kind of negative community, so that each could be taken by the first occupant. In the course of time most things were appropriated and became private property, and the right to them became exclusive; but others remain still in the negative community over which no one has a right, and, until appropriated, they belong to no one. These are subject to the same right of appropriation, and may be seized by the first occupant: *Quod nullius est id ratione naturali occupanti conceditur.* No one has a right to that which is *res nullius;* consequently, whoever possesses *rem nullius* possesses that which no one has a right to take from him. It is, therefore, his property. In the advanced state of civilization with which we are

blessed this kind of property is not common, but still it may be found."

Bouvier, Institutes, Sec. 491.

"Wild animals, whether they be quadrupeds, birds or fishes, produced in the sea, the heavens or the earth, become the property, by natural law, of whoever takes possession of them. It is the same when the animals or birds are caught on the premises of him who seizes them, or on those of another; but this does not authorize anyone to commit a trespass for the purpose of hunting."

Id., Sec. 492.

"The ownership of a thing, whether real or personal, movable or immovable, carries with it the right to all the thing produces and to all that becomes united to it, either naturally or artificially; this is called the right of accession, a right grounded on that of occupancy."

Id., Sec. 499.

"By emblements is understood the crops growing in the ground. * * * They belong to the owner of the land, or to the tenant who occupies it, who has sown and planted it."

Id., Sec. 501.

The testimony taken in the lower court leaves no doubt of the defendants' attitude as pleading guilty to the trespass and combination and acts of taking away the property of plaintiff, and obligation to account, as it is the testimony of participants in support of the allegations of defendants' motion that the Oyster Commission had been receiving $10,000 a season in revenues, so called, from the parties engaged in trespassing, as alleged by the plaintiff, upon the property in question. (See testimony of defendants' witnesses, Danehauer, Dunbar, Jouillian, Rec., pp. 23-32.)

The issue, therefore, as to the facts of this case, is reduced to a certainty. As will be seen from the said motion to dissolve, and the testimony of the defendants' witnesses Dunbar and Jouillian, defendants' trespass and conversion are avowed and avouched in quantities and figures, and to an extent more alarming than supposed by the innocent calculation of plaintiff as to its injury and loss and the value of property taken away. In the avowal of the wrongdoing and damage and value of the accounting the defendants, one and all, are less concerned than with the uncertain state of going on with and continuing their acts in the face of the injunction.

This evidence covering the determination of defendants to take oysters in the natural state wherever found, regardless of consequences, and to dispute the possession of any person found in possession of the object of their search, indicates flagrant violation of the Oyster Act (Section 10, Act 178 of 1906), prohibiting the Oyster Commission from attacking, directly or indirectly, any claims to private title, and protecting the owners of private titles from aggressive acts of the Oyster Commission. The Oyster Commission, while acknowledging that they have no authority to attack titles granted by the State to plaintiff or its authors, commit the unlawful acts complained of in open disregard of private titles and the provisions of the Oyster Act. The act provides only for an Oyster Commission to take charge of the public or outside oyster interests of the State as distinguished from the rights of the landfront proprietors, who are specially excepted from the provisions. These acts have been repealed, each in turn, and since the writ of error the Oyster Commission Acts have been abolished or repealed by the act 189 of 1910, possibly lacking an enacting clause; and had our titles been in

any way affected by the provisions of any one of these acts, it has never been declared, and the repeal of that act, and of the act repealing that act, would not revive the first act.

R. C. C., Art. 23.

We insert elsewhere a list of these acts, including the last act, known as the act giving exclusive control to the Board of Commissioners for the Protection of Birds, Game and Fish, reducing the subject of legislation to a system of conservation only as probably the extent of the legislation proposed and the substance of the political powers on the question. (Brief, p. 29.)

In the case of *Morgan vs. Nagodich et al.*, a patent of the description of our titles was enforced and sustained, the Court saying:

> "This land seems to have been recognized as part of the public domain, and as such the State sold it to the plaintiff's vendors. The Legislature has, by very strong implication, recognized the right of property therein as vested in private individuals. The District Judge was of the opinion that Bayou Cook was not an arm of the Gulf of Mexico, and that its banks formed no part of the seashore; hence, the land in question was not common property, but was susceptible of private ownership; and we are of the same opinion."
>
> *Morgan vs. Nagodich et al.*, 40 An. 253, 246.

The defendants have no authority for assuming that we have natural reefs, and then, proceeding to define and declare natural reefs, take away from us oysters in our possession. In the case of *Chauvin vs. Oyster Commission*, 121 La. 10, it was expressly declared that the Oyster Com-

mission had no authority to represent the State to attack a State patent:

> "Neither the State nor any of its agents can attack a State patent, valid on its face, in a collateral proceeding.
>
> "The acceptance by the State of land certified to it by the Secretary of the Interior as 'swamp and overflowed' is conclusive upon the State as to the title to and character of the lands so certified and subsequently sold by the State as such."
>
> *Chauvin et al. vs. Louisiana Oyster Commission et al.*, 121 La. 10.

> "While the authority of a public corporation, created as an agent of the State, may be very extensive in the direction in which it is intended to be used, such agent has not only less authority in other directions than the ordinary citizen, but has none whatever; and the authority conferred upon it can be sustained only in so far as not divested or controlled by authority emanating from the same or a higher source.
>
> "The State, through its agents, having sold a particular tract of land as susceptible of private ownership, the Oyster Commission, another agent charged with the control of oyster beds and water bottoms suitable for oyster beds, has no authority or standing in court to deny or attack the validity of such sale."
>
> *Chauvin et al. vs. Louisiana Oyster Commission et al.*, 121 La. 10.

> "The land in dispute was surveyed in 1831, the survey was approved in 1832, and it was selected as swamp and overflowed land, and patented as such to the State of Louisiana, in 1856. For more than half a century the United States and the State of

Louisiana have acquiesced in the title so conveyed, and more than thirty years ago the State patented the property to the author of plaintiff's title.

"At this late day the Oyster Commission, a mere agent of the State of Louisiana, assails all of the acts of the officials of the two sovereigns, and the patents issued by them, as absolute nullities, on the novel ground that a portion of the tract conveyed consisted of a tidalwater bottom; that, such portion not being land, the officials of the two Governments were without jurisdiction in the premises.

"The answers to this contention are: (1) That neither the State nor any of its agents can attack its solemn patent, valid on its face, in a collateral proceeding; and (2) that the acceptance by the State of lands certified to it by the Secretary of the Interior is conclusive upon the State as to the title to and the character of such lands. [Citing authorities.] The State being estopped to deny that the tract in dispute is 'swamp and overflowed' lands, evidence to prove the contrary was inadmissible."

Chauvin et al. vs. Louisiana Oyster Commission et al., 121 La. 10.

On the question of the boundaries of plaintiff's property and possession, we cite the following authorities. This question has been considered and discussed in briefs heretofore filed in connection with the extent of the operation of the Federal question:

"But if the salt water ascertained to be in the bayou, lake, gulf or inlet adjacent to or connected with an arm of the Gulf of Mexico does not result from an overflow that is occasioned by high tides flooding its banks, but in the first instance enters an arm of the gulf and thus passes into such bayou, lake, gulf or inlet, and is there combined with fresh water derived from other sources, it cannot be con-

sidered as an arm of the sea, or its banks the seashore, so as to be incapable of private ownership."

Morgan vs. Nagodich, 40 An. 246; Farnham on Waters, p. 212, note.

"We do not question the general principle that the word 'lands' includes everything which the land carries or which stands upon it, whether it be natural timber, artificial structures or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, nonnavigable rivers and waters of every description by which such lands or any portion of them may be submerged, since, as was said by the Court in *Regina vs. Leeds & Liverpool Co.*, 7 Ad. & El. 671, 685, 'lands are not the less land for being covered with water.'"

I. C. R. R. vs. Chicago, 176 U. S. 646.

Lowndes vs. Huntington, 153 U. S. 1 *et seq.*:

"With respect to the matter of title, there are involved not merely the construction of public grants and charters, but also the extent and purposes to and for which the title and control of submerged lands may be passed away from the State to towns and individuals."

Lowndes vs. Huntington, 153 U. S. 19.

"The tract in controversy, marked 'A' on this map, is within the limits of what is named thereon 'Huntington Bay.' The contention of the defendant is that that body of water is a part of the sound, and that, therefore, the north boundary granted to the Town of Huntington runs to the south of the tract in controversy; * * * that, inasmuch as bays are not mentioned, bays are not granted; and that the description of the sound as the north boundary excludes that body of water, with all its inlets and bays, from the scope of the grant.

"We are unable to concur in these views. If the language in the description of boundaries is clear, that should control, and should not be narrowed and limited by any mere ambiguity in the subsequent statement of the appurtenances to the grant. Or, to state the proposition in another form, whenever we are considering the matter of boundary, we naturally turn to the words by which the boundary is described, and accept these words as controlling, and do not look to those by which the scrivener attempts to define that which is to pass with the granted premises as appurtenant thereto, to see what is omitted therefrom or what is uncertain therein."

153 U. S. 22.

The rights conveyed by the plaintiff's patents are *declared* exclusive as well as inclusive.

Act 105 of 1886, page 197, Section 2:

"If any river, bay, lake, cove, inlet or pass makes into or runs through the land of any person, and is comprised within the limits of his lawful survey, such person or other lawful occupant shall have the exclusive right to use said bodies of water for planting oysters and other shellfish."

La. R. C. C., Art. 661 (657).

"The act is clearly exclusive in its scope. Such is the plain import of its terms. Even if the language were less clear, reliance might be had on the rule of construction in respect to such grants laid down by the Court of Appeals in *Langdon vs. New York City*, 93 N. Y. 129, 144: 'But when the sovereign grants land under water, which cannot in its natural state be subjected to any of the uses to which dry land may be devoted, then a different rule of construction must be applied to the grant, so as to make it effectual for some purpose. Such a grant

may be made to give an exclusive right of fishery, or of navigation, or to enable the grantee to fill up the land for wharves and docks or other buildings. The purpose may be plainly expressed in the grant; if it be not, then the intent of the parties must be ascertained from the nature and situation of the land granted and all the circumstances surrounding the grant which may properly be considered for the purpose of ascertaining such intent.'"

Lowndes vs. Hunting, 153 U. S. 31, 30.

* * * * * * *

"In other words, all that he (defendant) claims is that he had an implied license from the State, but such license (if one existed) was subject to revocation, and was revoked by the notice served upon him by the plaintiff, to whom the State had ceded all its rights."

Lowndes vs. Huntington, 153 U. S. 32.

* * * * * * *

"In the case of *Rogers vs. Jones*, 1 Wend. 237, * * * the question considered and determined was whether the grant carried the land under water, together with the exclusive right of fishing in such water, and it was held that it did."

153 U. S. 24.

"A case also in point is *Brookhaven vs. Strong*, 60 N. Y. 56. That action was, as stated, one 'brought to recover damages for taking oysters from the Great South Bay. * * * The bay is a sheet of water some fifty miles long and, in the widest part, five miles wide. The tide ebbs and flows throughout its whole extent, and it is navigable for vessels drawing from seven to eight feet of water. Plaintiffs claimed to be the owner of the bay within the limits above mentioned, and of an exclusive right of fishery therein. Defendant admitted the taking

1107 TWELVE GILMORE

of the oysters, but denied the exclusive right claimed by plaintiffs, and alleged that the place where they were taken was within the bounds of the Town of Islip, and was part of the navigable waters of the State, and that he, being a resident of the Town of Islip, had a right to take the oysters.'

"The south boundary of the grant made in 1866 to the Town of Brookhaven was the 'sea or main ocean,' and it was held that the grant included this bay, the Court saying: 'Nor can the objection that the bay was not included in the grant be sustained. The general boundary is the ocean, which includes the beach, and, of course, the bay.' "

Lowndes vs. Huntington, 153 U. S. 24, 25.

In *Mitchell vs. Smale*, 140 U. S. 412, Mr. Justice Bradley, who was familiar with the civil law and had become a learned Judge in Louisiana law while assigned to this circuit, after reviewing the subject previously disposed of in *Hardin vs. Jordan*, 140 U. S. 380, says:

"It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive proper owners of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned."

And as to these alleged surveys he says:

"But, since the grant to the respective States of all swamp and overflowed lands therein, this can-

not be done. * * * It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary."

Mitchell vs. Smale, 140 U. S. 412; *Hardin vs. Jordan*, 140 U. S. 380; approved in *McDade and Hall cases vs. Levee Board*, 109 La. 625; 111 La. 913.

In *Hardin vs. Jordan*, 140 U. S. 380, the Supreme Court of the United States said:

"It has been the practice of the Government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream or other body of water. The meander lines, run along or near the margin of such waters, are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines."

Hardin vs. Jordan, 140 U. S. 380.

"It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees."

Hardin vs. Jordan, 140 U. S. 380.

The different patents are tentatively projected in a diagram marked "B," annexed to the supplemental petition, showing the chain of patents continuously as a whole. (Rec., p. 37, and maps.)

Looking at the maps showing the location of Creole Gap and Grand Pass in the sections as alleged in the peti-

tion, it will be seen that the former (Creole Gap) is wholly, and the latter (Grand Pass) largely, included in the body of plaintiff's land, and wholly inclosed in the extensions of the section lines of the sections and fractional sections called for by the patents. It is now universally conceded that the extension of the section lines can be made as called for in the patent, etc. The extensions to the deep-water channel, also known as Grand Pass, or Southwest Pass, of Cat Island, the "Thalweg," or boundary, in the boundary case, leave the Township 10 as a fractional township on the North line, forming fractional sections strictly so called.

U. S. Rev. Stat., Sec. 2396-2nd, p. 442.

Judge Bradley says in *Hardin cs. Jordan*, 140 U. S. 396:

> "We do not think that this argument, *ab inconcenienti*, is sufficient to justify an abandonment of the rules of the comon law, which, as we have shown, have ben adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say: 'We think the common law might be improved, and we will, therefore, improve it.' As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms of flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends. But, whatever mode of determining the out-

going lines, as between adjoining owners, should be adopted in special cases (which may be left for determination when they arise), there can be no difficulty in the present case as between the plaintiff and defendant. The latter is not an adjoining owner. The controversy here is between a riparian owner and a party claiming the land under water in front of him; and, as between them, we think there is no question as to the riparian owner's rights."

Hardin vs. Jordan, 140 U. S. 398.

"The Supreme Court of Michigan, in a recent case (*Clute vs. Fisher*, 65 Mich. 48; since followed by *Stoner vs. Rice*, 121 Ind. 51), held that the riparian owner of a fractional lot bounded by a non-navigable lake only takes so much of the lake bottom as is required to fill out the section or quarter section of which he owns the fraction; in other words, that his common-law right is limited by the sectional lines of the survey. It was conceded, however, that, if the lake were so large that the lines of the granted sections would not embrace the whole lake bottom, then the riparian ownership would be extended to the center so as to include the whole bottom. In this case the sectional lines included all that was in dispute, the question being raised upon the cutting of ice on the surface. In the other case (*Stoner vs. Rice*) the rule so adopted gave to the riparian owner the whole of the lake bottom as against a subsequent grantee of the Government, a result identical with that which would have been produced by the unmodified common-law rule. These decisions, however, are interesting because they are founded on the principle that the Government surveys form a system or network of lands in block, whose sectional and subsectional lines, whether actually surveyed on the land or projected by the imagination through standing bodies of water, constitute lines of limitation which arrest and restrict any extension of a

grant by implication beyond them. This is substantially the principle by which the Roman *agri limitati* were governed. These consisted, generally, of districts or territories acquired by conquest, and assigned and set apart for the benefit of veteran soldiers when retired from active service in the army."

Hardin vs. Jordan, 140 U. S. 399.

"The same principle is involved in *Moore vs. Robbins*, 96 U. S. 530, 533, 534, where it is said by Mr. Justice Miller, speaking for the Court: 'With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and, if the Government is the party injured, this is the proper course.' Again, referring to the power of the Secretary of the Interior after patent, it is said:

'He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the Land Office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the Government to annul his title.'"

Hardin vs. Jordan, 140 U. S. 401.

"Mr. Justice Clifford in the case first cited (*Railroad Co. vs. Schurmeir*, 7 Wall. 272) says: 'Meander lines are run in surveying fractional por-

tions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the fieldnotes the meander line is represented as the border line of the stream, and shows to a demonstration that the watercourse, and not the meander line as actually run on the land, is the boundary.' It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain and to derogate from the value of natural boundaries, like streams and bodies of water."

Hardin vs. Jordan, 140 U. S. 381.

"Of course, as already stated, there is no question where the land abuts and bounds upon a freshwater stream or river. In such cases the law is perfectly plain. Sir Matthew Hale says: 'Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent, so that the owners of the one side have, of common right, the propriety of the soil, and consequently of the right of fishing, *usque ad filum aquae;* and the owners of the other side the right of soil or ownership and fishing unto the *filum aquae* on their side. And, if a man be owner of the land of both sides, in common presumption he is the owner of the whole river, and hath the right of fishing according to the extent of his land in length.' (De Jure Maris, P. I, C. 1.) And, while Hale speaks of rivers and streams, he probably means to include, certainly does not mean to exclude, all fresh waters, including lakes and ponds as well. But in England proper there are so few

lakes and ponds of large size, and so many fresh-water streams and rivers, that, in speaking of interior or fresh waters, it was natural to refer to the latter without mentioning the former. Lord Coke, however, when enumerating the different things that are comprehended under the term 'land' as a subject of ownership, mentions land covered with water. His words are: 'Also, the waters that yield fish for food and sustenance of man are not by that name demandable in a *praecipe;* but the land whereupon the water floweth or standeth is demandable; as, for example, *virginti acras terrae aqua co-opertas*—twenty acres of land covered with water.' (Co. Litt, 4 *r.*)"

Hardin vs. Jordan, 140 U. S. 388, 389.

"In Scotland, where there are many lakes, often of large extent, there has never been any doubt on the subject. It is true their system of laws is founded on the civil law, by which lakes and ponds are regularly of private ownership. Lord Selborne, in *Mackenzie vs. Bankes*, 3 App. Cas. 1324, 1328, says: 'It is to these facts that the law of Scotland with respect to the rights of riparian proprietors in inland lakes has now to be applied. Under titles such as those by which both the competitors in the present case hold (and when nothing turns upon any evidence of exclusive possession), the entire lake, if surrounded by the land of a single proprietor, belongs to that proprietor as a "pertinent" of his land. If there are more riparian proprietors than one, it belongs "ratably" to them all. So far as relates to the *solum* or *fundus* of the lake, it is considered to belong in severalty to the several riparian proprietors, if more than one; the space inclosed by lines drawn from the boundaries of each property, *usque ad medium filum aquae*, being deemed appurtenant to the land of that proprietor, exactly as in the common case of a river. * * * And, cen-

45

turies before Justinian, Cicero spoke of the many lands, houses, lakes, ponds, places and possessions confiscated by Sylla and conferred upon his own favorites. (Agra. Law. Orat. 3, C. 2, 7.)' "

Hardin vs. Jordan, 140 U. S. 390.

"As many features of the common law with regard to the rights of riparian owners were borrowed directly from the civil law (Hale, De Jure Maris, P. I, C. 6, p. 28), it would not be strange if the rule relating to lakes and ponds came from the same source. It was recommended by the same reasons that applied to fresh-water rivers and streams. When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it. Hence, the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water. Besides, a lake or pond, like a river, is a concrete object, a unit, and, when named as a boundary, the natural inference is that the middle line of it is intended; that is, the line equidistant from the land on either side."

Hardin vs. Jordan, 140 U. S. 391.

"But we are not without express authority, in addition to that of Lord Coke, as to the rule of the common law. As before observed, the small number in England of the bodies of water of the kind now under consideration would lead us to expect but few decisions on the subject compared with those relating to rivers and streams. But the precise question has been brought before the Courts in recent times, and has been decided as from the reason of the thing we should anticipate it would be. *Bristow vs. Cormican*, 3 App. Cas. 641, is directly in point, and received the consideration of the best legal minds

in England. It related to riparian rights in Lough Neagh, a lake in the north of Ireland, about fifteen miles in length (north and south), and about ten miles in breadth, situated some fifteen miles west of Belfast, and having the Town of Antrim near its northeastern extremity. The plaintiff sued the defendants in trespass for fishing in the lake, and deraigned title from the Crown by a grant made in the time of Charles II of all the fishing in Lough Neagh; and the question was whether the Crown had the right to make such a grant. The decision was unanimous that it had not."

Hardin vs. Jordan, 140 U. S. 391.

"Of course, this decision has not the controlling authority which it would have had if it had been made before our Revolution. But it is the judicial decision of the highest authority in the British Empire, and is entitled to the greatest consideration on a question like this—of pure common law."

Hardin vs. Jordan, 140 U. S. 392.

"In other States the rule of the common law has prevailed as enunciated in *Bristow vs. Cormican* —as in New York, New Jersey, Ohio, Michigan, Indiana."

Hardin vs. Jordan, 140 U. S. 393.

"The title of the individual, being personal in him, is exclusive, subject only to a servitude to the public for purposes of navigation if the waters are navigable in fact. * * * And all the cases in which waters above the ebb and flow of the tide, such as great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for purposes of navigation are confessedly a departure from the common law."

Cobb vs. Davenport (New Jersey case), cited in *Hardin vs. Jordan*, 140 U. S. 395.

"We need not depend upon the English case of *Bristow vs. Cormican* alone, great as its authority necessarily is; but are surrounded by a cloud of witnesses in our own country whose testimony is in harmony with that decision. We will only refer to a single other case decided in Illinois itself in 1867 (*Beckman vs. Kreamer*, 43 Ill. 447), which, with the cases as to riparian rights on rivers and streams, ought to be conclusive as to the common law in that State. * * * The case arose with regard to the right of fishing in a small lake in Kankakee County, with an outlet in the Kankakee River, seven miles distant. From the State map we infer that the lake was two or three miles in length. It abounded in choice fish, and was claimed by the plaintiffs as their private property, they owning the surrounding lands. A party came with teams, boats and a seine, which last they dragged in the lake against the will and protest of the owners of the land. The latter brought an action of trespass and recovered damages. Mr. Justice Breese, in announcing the decision of the Court, laid down the following principle of law: 'By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water where the tide does not ebb and flow that, if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends—to wit, to the thread of the stream—where he owns upon one side only."

Hardin vs. Jordan, 140 U. S. 395.

"The case is stronger if the land passed under the Swamp-Land Act, as has been held by the State Court with regard to this and similar patents."

Kean vs. Calumet Canal Co., 190 U. S. 459; citing *Mitchell vs. Smale*, 140 U. S. 406, 414; *Tolleston Club vs. State*, 141 Ind. 197.

"The making of a meander line has no certain significance. In this case its immediate import was only to indicate the contour of the lake."

Kean vs. Calumet Canal Co., 190 U. S. 460.

"No difficulty was felt on the ground that the survey did not cover the submerged land in *Hardin vs. Jordan*, 140 U. S. 371. But, furthermore, the land was selected as 'swamp and overflowed lands' by the State. It not appearing otherwise, the selection must be presumed to have included the land overflowed, and, if so, it was confirmed by the State by the act of March 3, 1857. (Rev. Stat. 2484.)"

Kean vs. Calumet Canal Co., 190 U. S. 460.

"The resurvey by the United States in 1874 does not affect the Calumet Company's rights. As the United States already had conveyed the lands, it had no jurisdiction to intermeddle with them in the form of a second survey."

Kean vs. Calumet Canal Co., 190 U. S. 461;
citing *Hardin vs. Jordan*, 140 U. S. —.

"BOUNDARIES; MEANDER LINES; CONVEYANCE BY GOVERNMENTAL DIVISIONS. Meander lines are not boundary lines; and, where land is conveyed by a governmental division, the whole division, both within and without the meander lines drawn on the original plat—the wet land as well as the dry—passes with the deed; and the fact that the Government's patent specifies the land conveyed as a fractional part of such a division, naming the number of acres, does not change the rule as to the quantity of land conveyed, for the quantity thus named refers to the fact that that division contains only that number of acres of dry land. Where, in such a case, the dry land without the meander is divided into lots, and there is nothing to show that it was intended to bound the lots by the meander, a patent

from the State for one of the lots, describing it by its number and section, conveys the whole of such lot to the opposite section line."

Tolleston Club vs. State, 141 Ind. 197.

"SURVEYS; GOVERNMENT SURVEYS; CONCLUSIVENESS. The description and plat of the original Government survey, filed in the General Land Office, as made by the Surveyor-General from the field-notes, are conclusive; and the section lines and corners as laid down in the description and plat are binding upon the General Government and upon all other parties concerned."

Tolleston Club vs. State, 141 Ind. 197.

"As frequently decided, meander lines are not boundary lines, unless expressly made so in the instrument of conveyance. The full title of the grantor to the whole section or other division named, both within and without the meander line—the wet land as well as the dry—passes with the deed."

Tolleston Club vs. State, 141 Ind. 207; citing *Hardin vs. Jordan*, 140 U. S. 376, and other cases.

"We therefore conclude that the whole section, in each case, was fully described in the list, and that the title to all of the land so described and listed was confirmed to the State by the act of 1857.

"What we have said as to the list applies also in great measure to the patent. The objection to the latter is that the sections are there described as fractional, and, hence, that the patent does not convey the full sections, but only the parts within the meander lines.

"The term 'fractional,' as applied to the sections named in the patent, refers simply to the circumstance that they do not contain 640 acres each of dry land. As we have seen, however, the sec-

tions were fully surveyed; the corners and boundary lines were determined and recorded in each instance. It follows from what we have already said, and from the authorities above cited, that the conveyance of the fractional sections carried title to the extreme boundary lines of the sections. All was conveyed. There remained to the United States neither upland nor lowland, whether exposed to the surface or covered by the waters of the marsh or the river. The State took to the section lines."

Tolleston Club vs. State, 141 Ind. 208.

"If the State sold the sections by their number simply, as given in the General Land Office list, or as fractional sections, as named in the patent from the United States, there would be little question that the entire sections were conveyed. Even if the parts between the meander lines were all sold, as some of them were, as quarter or quarter-quarter sections, or by some other exact subdivision, there would be as little doubt that the subdivisions so named would be fully conveyed. This counsel tacitly admit. But, because the sales made by the State were in most cases made by lot numbers, it is argued that only the dry land outside the meander line was conveyed. As already said, a meander is not a boundary unless expressly made so."

Tolleston Club vs. State, 141 Ind. 212.

"But, by the admission made at the trial, and from an examination of the State patents in the record, it appears that the meander was not made a boundary line in the sales made by the State. On the contrary, the State, in making its sales, adopted the plats and lot numbers of the United States survey, with dimensions, acreage and numbers all as made in the original survey of 1834.

"It seems very clear that, whatever the State received from the United States she conveyed fully

in her patents to the purchasers of the same lands, all described as in the survey upon which she bases her own claims to the lands."

Tolleston Club vs. State, 141 Ind. 212, 213.

"The field-notes show that the whole territory in dispute was covered with water. In these field-notes the locality is always referred to as the 'lake,' the 'river' or the 'water,' and sometimes as 'river or lake'; while the river proper is referred to as 'main channel' or 'the river flowing through the lake.'"

Tolleston Club vs. State, 141 Ind. 210.

"The territory within the meanders was then, and has continued to be ever since, covered with water during the greater part of the year. The field-notes state that the water was then from one to ten feet deep."

Tolleston Club vs. State, 141 Ind. 211.

ALLUVIAL CHARACTER AND CONDITION OF THE TERRITORY.

The whole area represented by the said patents, and particularly the northeastern projection known as "Isle à Pitre," is peninsular in character, and, as alluvial territory, is protected by the law of accretion, both from the imputation of defendants that the said bodies of water can be cut out of petitioner's title and that defendants are at liberty to encroach upon the perimeter of petitioner's shore-front, and make a profit to themselves of the advantages that the property possesses in consequence of its natural position and extent, without accounting to petitioner for their illegal acts. Mr. Chief Justice Fuller in the *Boundary case* repeatedly insists upon the peninsular and alluvial formation and character, and the deep-water current is taken, between this property and Cat Island, for a boundary as a river whose current and compulsive course scarcely knows no "retiring ebb."

The plaintiff is the owner under purchase by the authors of its title from the State of Louisiana under the swamp and overflowed land grants selected and approved to the State by the Secretary of the Interior. The land in question lies along the southern shore of this deep-water-channel boundary outlined and adopted in the said *Boundary case (Louisiana vs. Mississippi,* 202 U. S. 1 *et seq.).* The report and printed transcript and maps in said case are adopted and referred to by agreement of counsel of record as part of the transcript of appeal in this case. (Rec., p. 97.) Now, in the *Boundary case* we are called upon and assisted in every way, and our titles were declared upon and pleaded by, the State, and acquiesced in and ratified by the State, and substantially upheld in the decree, and there was, and is, no conflict between the State and our rights; and, if there is any conflict between our titles and the Oyster Act, the State is concluded by her acts and the law and facts as found and the decree in that case, as a party in that case, and could not now dispute their validity.

> "The River Iberville is called on this map Bayou Manchac, and is still known by that name. The Rigolets is a gut connecting the waters of Lakes Pontchartrain and Borgne. * * * In order to reach the open waters of the Gulf of Mexico from the middle of Lakes Maurepas and Pontchartrain, the line ran through the Rigolets into Lake Borgne, and after the addition to the State by the act of April 14, 1812, the eastern boundary line of Louisiana entered Lake Borgne to the south by Pearl River, as well as the Rigolets. To get from Lake Borgne into the open water of the Gulf of Mexico beyond Chandeleur Islands and around to the western boundary of Louisiana, it was necessary, as Louisiana contends,

to follow the deep-water channel, * * * through Mississippi Sound, and thence by the pass between Cat Island and Isle à Pitre, north of the Chandeleur Islands, into the open gulf.

"Certainly there are in the body of the Louisiana marshes, or St. Bernard peninsula, portions of sea marsh which might technically be called islands, because they are land entirely surrounded by water; but they are not true islands. They are, rather, as the Commissioner of the General Land Office wrote the Mississippi Land Commissioner in 1904, 'in fact, hummocks of land surrounded by the marsh and swamp in said townships.'"

State of Louisiana vs. State of Mississippi, 202 U. S. 37, 46.

"That there is a deep-water sailing channel line emerging from the mouth of Pearl River, and extending east between Lower Point Clear and Grand Island, is shown by the numerous maps, surveys and sketches in the record. It separates into two branches, one of them between Cat Island and Isle à Pitre."

Ib., 202 U. S. 47.

"The southern portion of Louisiana is geologically of an alluvial formation, containing the delta of the Mississippi River. The peninsula of the Parish of St. Bernard is practically a part of this delta formation."

Ib., 202 U. S. 48.

" * * * The record shows that the strip of water, part of Lake Borgne and Mississippi Sound, is not an open sea, but a very shallow arm of the sea, having, outside of the deep-water channel, an inconsiderable depth."

Ib., 202 U. S. 52.

"Islands formed by alluvion were held by Lord Stowell, in respect of certain mud islands at the

mouth of the Mississippi, to be 'natural appendages of the coast on which they border, and from which, indeed, they are formed.' (*The Anna* [1895], 5 Rob. 373.)"

Ib., 202 U. S. 53.

"The lands in these townships were surveyed by the Government about the year 1842, all of them as being in and forming part of the State of Louisiana. By the swamp-land grants of 1849 and 1850, the United States granted to certain States the swamp and overflowed lands within their respective limits in order that these lands might be reclaimed, protected from overflow and brought into use. * * * They all lay south of the deep-water channel, and were all approved to the State of Louisiana May 6, 1852. They were then offered by the State, through the Register of the State Land Office, for sale, and many sales of them were made from time to time to individuals, and patents issued therefor, in various years from 1853 to 1894. In 1892, in furtherance of the better protection of the lands of the Parishes of St. Bernard and Plaquemines from overflow, the Legislature of Louisiana adopted an act which created a Lake Borgne Basin Levee Commission, and provided a board of commissioners therefor, as a department of the State Government, and the Register of the State Land Office was authorized to transfer all of the unsold lands to the board, which was done in April, 1895. * * * Isle à Pitre was composed of certain enumerated sections of Township 10 South, Range 20 East, and these lands were approved to Louisiana by the Commissioner of the General Land Office of the United States, May 6, 1852, as forming part of that State, and they were subsequently patented, sold and conveyed to various individuals, the chain of title extending from 1852, a period of over fifty years. The lands forming Isle à

> Pitre have been paying taxes to the State of Louisiana for years."
>
> *Louisiana vs. Mississippi*, 202 U. S. 54, 55.

Gould on Waters (2nd Ed.), in the definition of rivers given in that work, says:

> "41. RIVER AND WATERCOURSE DEFINED. A river is a running stream of water pent in on either side by banks, shores or walls, and it bears that name as well where the waters flow and reflow with the tide as where the current is always in one direction. Every river consists of (1) the bed, (2) the water, (3) the banks or shores; and it also has a current. It is a river or watercourse from the point where the water comes to the surface and begins to flow in a channel until it mingles with the sea, the arms of the sea, lakes, etc."

It is in this sense that this deep-water channel of the portion of Mississippi Sound is treated in the *Boundary case* by Chief Justice Fuller. In the opinion by the Chief Justice, speaking as the organ of the Court, it is said that the deep-water channel is traced continuously between the two States from the intersection of Pearl River and out to sea between Cat Island and the property involved in this case, referred to as "Isle à Pitre," or the "peninsula of St. Bernard."

This property claimed by plaintiff is entirely alluvion, suffering from inundations of rainfall and subject to overflow of fresh waters which have formed a fresh-water basin from the Mississippi River by crevasses or back waters of the delta. The various minor streams or bayous are drains which remain from a former time and are a part of the realty, draining these lands, but re-

maining below sea-water level, and belong exclusively to the owner of the realty, and where navigable, as to which there is no issue in this case, as none of the streams is of this character, the owner would take the exclusive use of the bed of the stream as proprietor of both sides. The nature of this property is well described in the opinion of this Court by Breaux, C. J., in the case of *Board of Commissioners vs. Michelovich*, 52 An. 1292; also, by Fenner, Judge, in *State vs. Buck et al.*, 47 An. 676, where the territory is declared to be alluvion brought down by the "great father of alluvion." And this condition is most clearly appropriate to this country east of the river.

The general condition obtains of priority of property or ownership prevailing at common law, where all fresh-water streams and bodies of water are private property as distinguished from the rule of the sea, whether in fact navigable or not, wherein the fishing is private for all purposes in the owner of the land. But we make no pretense to fishing whatever, but only as concerned with the private ownership of our lands claim our territorial rights to the emoluments to be derived from ownership facilities of our property.

Bristow vs. Cormican (Lough Neagh case).

The law is well understood in this State as to the effect of crevasses or overflows over the country constituting the alluvion of the Mississippi River as not divesting the ownership of the proprietors. This doctrine, fundamental in the civil law, is recognized as well at the common law.

> "When a tidal river does not work a shifting of the shore, but by the eruption of its waters forms an entirely new channel in private land, not only does the right to the soil thus covered remain in the

owner, but the right of fishing is his, and not in the public, though the public right of navigation may extend to the new channel."

Gould on Waters, p. 319.

In the case of *Leovy vs. United States*, 177 U. S. 621, the Court has particularly taken notice of the alluvial nature and condition of these swamp and overflowed lands of Louisiana, resulting from overflows, and channels remaining from former crevasses, and declared these channels are not navigable within the intent and meaning of the acts of Congress.

In *Leovy vs. United States*, 177 U. S. 621, Judge Shiras, the organ of the Court, in the opinion on this subject, declares:

"There was evidence tending to show the character of the country affected by floods from Red Pass—that it was swamp land and sea marsh from the Mississippi River to the Gulf."

Leovy vs. United States, 177 U. S. 626, 627.

* * * * * * *

"It is conceded that Red Pass is not a natural stream, but is in the nature of a crevasse, caused by the overflow of water from the Mississippi River."

Leovy vs. United States, 177 U. S. 627.

"The evidence on the part of the defendants showed that, for many years, these crevasses or passes have been steadily growing shallower and narrower, and that, at the time of closing Red Pass, few of the smallest craft attempted to pass through it, and that the s-ocalled mouth, or end, of Red Pass, next the gulf, had closed up and become a mere marsh. The trifling use that was made of that pass was restricted to the river end of the crevasse."

Leovy vs. United States, 177 U. S. 627.

* * * * * * *

"We have read the testimony offered on behalf of the United States to show the kind and extent of the navigation of the Red Pass, and there is no view we can take of it that warranted the jury in finding that interstate commerce was ever transacted thereon. A few fishermen testified that they occasionally went through this pass with small vessels, carrying oysters for planting, and one or two cargoes of willows and timber were spoken of. None of these witnesses pretended to have carried produce or oysters out of the State."

Leovy vs. United States, 177 U. S. 634.

The case of *Bristow vs. Cormican*, before the House of Lords in 1878, known as the *"Lough Neagh case,"* was an action of trespass for taking fish in Lough Neagh, a freshwater lake in the north of Ireland, over the whole of which plaintiff claimed a right of fishery under a grant of fishery and islands in the lake from King Charles II. Judge Bradley comments upon this case at length with strong approval in *Hardin vs. Jordan*, 140 U. S. It was held there was no severalty of fishery from the shore or riparian property, and nothing in the Crown; and, as there was no dispute between the riparian proprietors, no other rights were involved. The Lord Chancellor said:

"The Crown has no *de jure* right to the soil of the fishery of a lough like Lough Neagh."

Lord Blackburn:

"But no question arises in this case as to the rights of riparian proprietors amongst themselves where no title is made by either party. It is, however, necessary to decide whether the Crown has of common right *prima facie* title to the soil of the lake. I think it has not. I know of no authority for saying it has, and I see no reason why it should have it."

Angell on Tide Waters, p. 30, speaking of the case of *Blundell vs. Cotterel*, 3 B. & A., cited herein, said:

> "The topic urged at the bar, and by Mr. Justice Best, of *public convenience*, met with no favor from the majority of the Court, who held that public convenience must in all cases be viewed with a due regard to private property, the protection whereof was 'one of the distinguishing characteristics of the law of England.'"

The importance of the bearing of this case on the subject may be inferred from the opinion being reported in full in the appendix and the unconscious approval of the preface.

Chancellor Kent, speaking of the modern case of *Blundell vs. Cotterel*, says:

> "The case of *Bagheet vs. Orr* may be considered as shaken by that of *Blundell vs. Cotterel*, 5 B. & Ald.
>
> "The doctrine of *Peck vs. Lockwood* seems to be very questionable."
>
> 3 Kent Com. 417, Note *c*.

The distinction of ebb and flow of the tide, which had long produced conflicts of jurisdiction and confusion, is practically done away with in England, where the rule now is that navigability depends on the fact of navigability, not on the question of the presence or absence of tide. The doctrine of cases on this subject has little bearing in a country where little or no tide exists, as on the Gulf coast and the Mississippi delta, lying wholly in the State of Louisiana and in the dominion of the civil law, and the countries subject to the Roman law.

Chancellor Kent shows that the old common-law fictions of a common right of fishing or piscary have largely become obsolete, and were, in their nature, essential and appurtenant or appendant to the property in question, and for the benefit of that property or vicinage only.

Modern law abolishes rights of common not related to or covered by the definition of things common to all mankind.

The rights of navigation or commerce are about the only rights of common that are general in nature; and in all cases of "common" it was a rare case where it could be pretended that anyone but the owner or lord of the manor could derive a profit from the land in question. *Profit à prendre in alieno solo* was never contemplated at our law, where servitudes are strictly classified and defined.

Llandudno vs. Woods (1899), 2 ch. 705; Farnham on Waters, p. 231.

But, as shown by the case of *Blundell vs. Cotterel*, 3 Band. & Ald., when it comes to claiming a right to invade, *vi et armis*, private property, or draw alleged profits or revenues therefrom, we deny there is any right at common or uncommon law.

Now, petitioner shows that the rights of common, or common of piscary, do not apply or extend to a case of this kind, and are foreign to our jurisdiction, and that rights of common are of a feudal origin and nature, and Chancellor Kent is clearly of this opinion. The only rights recognized by our law are those of servitude, which are provisions of positive, textual law, and subject to strict construction; that the distinctions of common law with reference to tide waters particularly would be obsolete in our jurisdiction, and the law of Louisiana, under the provisions and principles of accretion embodied in the articles of the Code, gives to the littoral proprietor protection

for all the rights, privileges and possibilities of value incident to his property, extending to the thread or center of the stream, whether navigable or not, *ad medium filum aquae*, according to the literal text of Article 509 of the Code, and so, possibly, in our case, extends these rights to the "thalweg," or main deep-water channel, Southwest Pass of Cat Island.

The only rights of servitude to which the waters are subject through its waters are those of navigation and commerce in favor of the public. The right of "common" would not prevail in the public. The patents would be considered but as land titles, as in the *Chauvin case;* as in that case, and in *Morgan vs. Nagodich* and cases cited, conveying swamp and overflowed lands, and not, in fact, seashore or waters included in the high seas, as said in that case. All aquatic rights, including that of oysters, in the territory would belong to the land, not as severable from it, but peculiar to its ownership, and appendant and appurtenant to the particular place where located.

The attempt of the Oyster Commission to lease out, or declare open to the public, the water bottoms or other property of the plaintiff, and of the canning company to get possession of these places under lease or license from the Oyster Commission, is beyond the scope of the powers or functions of the Oyster Commission. The tenth section of the last act, the amendatory act (Act No. 178 of 1906, pp. 323, 324), provides:

> "SECTION 10. *Be it further enacted, etc.*, That the said Commission shall have power to lease any water bottoms in the State of Louisiana, as described in Section 1 of this act, and the title whereof is vested in the State of Louisiana, and is not claimed under some title by any person; and no lease of any bottom which may be so claimed by a private individual, firm or corporation shall be valid, or have

> any effect, until there shall have been an adjudication by a Court of competent jurisdiction between the State and claimant as to the validity of the title of the property to be leased."

This proposition of the public right of fishery, whether because it is personal to the individual citizen or not in dispute in the cases, is usually avoided or not considered in the case. The plea is too general in its nature to be relevant to any interest whatever. The explanation we make is that we make no attempt on, or question of, the ancient right of fishing as understood with regard to fishing for floating fish. As said in the English case of *Rogers vs. Allen*, 1 Camp. 309, which was an action of trespass for dredging oysters, the right of fishery is divisible. In this case the fishery was held to be divisible, Heath, J., saying:

> "Part of a fishery may be abandoned and another part of more value may be preserved. The public may be entitled to catch floating fish in the River Burnham, but it by no means follows that they are justified in dredging for oysters, which may still remain private property."

We have never claimed any rights of fishing so called, but, on the contrary, insist there could be no severalty of fishing from the shore of the land which we own, any more for oysters than for floating fish, by the said Commission, as at present organized, as a Fish and Game Commission. But the common law in effect is not hostile, and recognizes and defines our interest under the divisions of the subject, and repudiates severalties introduced by charters of King Charles II, etc.

Our position is that we have a right to all oysters on the property in dispute as an incident to the property, in-

distinguishable from, or more valuable, possibly, than, the land; at any rate, so identified with the proprietorship as to be inseparable in the owner from the title to the property. This description of right appears to correspond with a recognized form of right at common law included in the designation of the subject of fishery known as "territorial fishery." (3 Kent Com. 411.)

Woolrych on Waters, p. 87, says:

> "A right of any kind means, in strict legal language, a profit or easement which is enjoyed in the soil of another; and thus, when we speak of a right of fishery, we mean the liberty of fishing in the water of another, and it has been so defined. (4 Com. Dig. 365.) When, therefore, we discover that the soil over which the stream runs, and the water itself, belong to the same person, we do not say correctly that such an individual has a right of fishery, because the land and its profits are so completely identified as his inheritance that they cannot be separated. If any description be applied to it, it should be that of territorial fishery (Schultes on Aquatic Rights, p. 87), because the party has the dominion over the territory or land itself. And, hence, it follows that those who maintain the opinion that the owner of a several fishery must, necessarily, have the soil as incident to the enjoyment will consider this territorial possession as the several fishery so frequently mentioned in our books."
>
> Gould on Waters, p. 356, note.

We have spoken of land and not of fish, as distinguished by Chief Justice Abbott in *Blundell vs. Cotterel*, quoted at p. 73. From the latter we studiously abstain because no question of that kind is before the Court, and it is unnecessary to say anything upon it.

On the one hand, defendants claim that these properties are worthless, and, on the other, worth millions; and between the extremes they would sacrifice the interest of the front proprietors, who are the people or public in legal relation to the property in a properly constituted order of society, and leave them the worthless part. The case in their own speculative notions of discovery and *ad valorem* estimate illustrates their motive, and the damage they will inflict upon owners unprepared to preserve their property.

For a paltry oyster tax, the cannery companies, and a class of labor attached to them, are invited upon petitioner's property in defiance of law and order, to leave it stripped of shells and oysters. This condition of things applies most forcibly to the lands exposed to the shore of the State of Mississippi. Here the canneries from the State of Mississippi have simply transferred their plants to the Louisiana shore, and continue depredations upon these lands. It was this very condition which it was the purpose of the *Boundary case* to avoid.

Defendants' counsel denounce the land, in one moment, as worthless; in the next, the lands are discovered to be yielding alleged large revenues to themselves, of which they would deprive the owners to make them worthless to the owners to secure their object.

It is one of the peculiarities of jurisprudence that the law will deal with a case of this kind as it arises, when the plea of public necessity is urged by interested parties, and it is attempted to take away the more valuable part (the undisturbed possession) of the property, and leave the worthless, which ownership is less valuable than possession of the whole, and will protect things which are worth owning, if ownership in the thing itself, without

which the parts of value would not exist, is once recognized or established, as in the case of the judgment of Solomon.

In Sohm's Institutes of Roman Law, pp. 252, 253, we find:

> "In ordinary language, ownership and possession are often used as convertible terms. Nevertheless, the conception of ownership and possession ought to be clearly distinguished.
>
> "I hold the thing in the same way as if I were its owner, whether I am owner or not, and whether, again, in the latter case, I know I am not the owner, or otherwise (as in the case of a *bona fide* possessor or *usucapio* possessor). This second kind of possession is known as 'juristic possession.'
>
> "Two elements go to make up juristic possession: First, *corpus* (detention), and, second, the animus, or intention to hold the thing for oneself alone. Juristic possession—and it is to this fact that its name is due—gives rise to certain remedies which are granted for the purpose of protecting it."
>
> La. C. P., Art. 49; Civil Code, Arts. 3453, 3454, 3455.

"The above-mentioned possessory interdict *(recommendae et recuperandae possessionis)* can be claimed by the juristic possessor as such quite apart from the question whether he has really any right in the thing or not. This possession entitles him to a legal remedy (and it is for this reason that interdicts are called 'possessory remedies') quite irrespective of his rights. Nay, the question of right is positively excluded. It is no defense for the defendant to appeal to his right in the thing.

"Nevertheless, in their practical result, these possessory remedies, while formerly only protecting possession, uniformly served the purpose of protecting ownership. In the great majority of cases, it is the owner who, together with his ownership, has, or

has had, the juristic possession. The owner, consequently, has, as a rule, the following remedies:

* * * * * * *

"He may proceed by a possessory remedy, and confine himself to proving his juristic possession—*i. e.*, leaving his title not only as owner, but also as *usucapio* possessor, out of the question, he may merely contend that, in his case, the requirements of juristic possession—*i. e.*, actual control over the thing accompanied by the *animus domini*—are satisfied, and take effect.

"Nothing proves more strikingly the vast economic importance of ownership than the abundance of legal remedies which were developed for its protection."

Sohm's Institutes of Rowan Law, pp. 255, 256; Planiol, Code Civile, Vol. 1, p. 724.

In the modern English case of *Blundell vs. Cotterall*, 3 B. & Ald. 362, this policy was so clearly outlined and defined that little is left of the long line of contention of right of common or severalty of incorporeal rights at common law in favor of individuals who are so good as to take upon themselves the assertion of rights in behalf of the public in respect to property owned by private title. In that case, although the defendants were successful in influencing one Judge to take the assumed belief that theirs was the popular side of the controversy in their claim to protection at common law for an alleged right of using bathing machines, it was not so held. They demurred to plaintiff's title, because a right of bathing on the seashore existed at common law. The Court of King's Bench, through Chief Justice Abbott and two Associate Justices, found no difficulty in holding that bathing in the sea was not a right existing at common

law, and that, therefore, the lord of the manor had the "say" as to any money to be made out of the front, and was entitled to injunction, Chief Justice Abbott observing:

> "I have considered this case with very great attention, from the respect I entertain on this and all other occasions for the opinion of my learned brother Best, though I had no doubt upon the question when it was first presented to me; nor did the defendant's counsel raise any doubt in my mind by his learned and ingenious argument. This is an action of trespass, brought against the defendant for passing with carriages from some place above high-water mark across that part of the shore which lies between the high- and low-water mark, for the conveyance of persons to and from the water for the purpose of bathing. The plaintiff is the undoubted owner of the soil of this part of the shore, and has the exclusive right of fishing thereon with stake nets. The defendant does not rely upon any special custom or prescription for his justification, but insists on a common-law right for all the king's subjects to bathe on the seashore, and to pass over it for that purpose on foot, and with horses and carriages; and this right is the only matter which, by the terms of the special case, is submitted to the opinion of the Court. Now, if such a common-law right existed, there would probably be some mention of it in our books; but none is found in any book, ancient or modern. If the right exist now, it must have existed at all times; but we know that sea-bathing was, until a time comparatively modern, a matter of no frequent occurrence, and that the carriages by which the practice has been facilitated and extended are of comparatively modern invention.
>
> "There being no authority in favor of the affirmative of the question, in the terms in which it is

proposed, it has been placed in argument at the bar on a broader ground; and, as the waters of the sea are open to the use of all persons for all lawful purposes, it has been contended, as a general proposition, that there must be an equally universal right of access to them, for all such purposes, over land like the present. If this could be established, the defendant must undoubtedly prevail, because bathing in the waters of the sea is, generally speaking, a lawful purpose. But, in my opinion, there is no sufficient ground, either in authority or in reason, to support this general proposition."

Extract from opinion of Abbott, C. J., in *Blundell vs. Catterall*, 5 B. & Ald. R. 268.

The contention of the defendants—of a common of fishery—is easily disposed of by a consideration of the doctrine of possession, accretion and accession under the clearly-defined provisions of the Civil Code.

C. C., Arts. 488, 498, 499.

Accession takes place to everything above and below the property of the proprietor; and in this case, within its title, plaintiff takes the oysters within the limits of the boundaries, and enjoys provision for ample protection in the riparian rights beyond its boundaries to the extent to which the principles of accretion apply in respect to alluvion or alluvial rights in both senses of its possession as owner of the land within its section lines, and to the distance beyond which riparian rights extend. Oysters are appurtenant to the proprietorship, and such is the strength and validity of the plaintiff's possession that the defendants have no right to come and pirate within petitioner's lawful possession, or to find and take away oysters or anything else. If oysters are there (which we need not now acknowledge nor

deny as to intruders on our lawful possession), they, like any other product or fruits of the property accessory to the thing or land, are accessories to the ownership, and our possession is sufficient to maintain trover or trespass, or defeat any other's attempt to enter upon our possession and take them away, particularly in quantities, which only could be successfully attempted by parties in unlawful combination, as in this case.

While Article 509 of the Civil Code, in reference to alluvion, prescribes that the accretions which are formed successively and insensibly to the soil belong to the riparian owner, yet any disturbance of that process attaches so insensibly to the right of accession to what is above and below the property as to be indistinguishable from the ownership. The indivisible right of accession takes place in such a manner, both as to accessories and accretions in concrete form of expression of the principle, as to belong to the property inseparably from protection and preservation of possession and ownership.

> "Ownership is the right by which a thing belongs to someone in particular, to the exclusion of all other persons."
>
> C. C., Art. 488.
>
> "Rights, which are common to all possessors in good or bad faith, are:
>
> * * * * * * * *
>
> "(2) That every person who has possessed an estate for a year, or enjoys peaceably and without interruption a real right, and is disturbed in it, has an action against the disturber, either to be maintained in his possession or to be restored to it, in case of eviction, whether by force or otherwise."
>
> C. C., Art. 3454.

"The ownership of a thing, whether it be movable or immovable, carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or artificially.

"This is called the right of accession."

C. C., Art. 498.

"Fruits of the earth, whether spontaneous or cultivated, civil fruits—that is, the revenues yielded by the property from the operation of the law or by agreement—and the young of animals, belong to the owner by right of accession."

C. C., Art. 499.

"All that which becomes united to or incorporated with the property belongs to the owner of such property, according to the rules hereafter established."

C. C., Art. 504.

"The ownership of the soil carries with it the ownership of all that is directly above and under it."

C. C., Art. 505.

"The accretions which are formed successively and imperceptibly to any soil situated on the shore of a river or other stream are called 'alluvion.'

"The alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or stream, and whether the same be navigable or not, who is bound to leave public that portion of the bank which is required by law for the public use."

C. C., Art. 509.

Sohm's Institutes of Roman Law, on the subject of Different Union of Things, p. 247, says:

"The union of several things into one is either (1) a union in the narrower sense of the term, or (2) an accession, or (3) a specification.

* * * * * * * *

"If, however, the new thing is identical in kind with only *one* of the pre-existing things, we have a case of 'accession.' This happens, *e. g.*, when an arm is so joined to a statute by ferruminato [*cf.* Dernburg, Pandekten, Sec. 209, Note 6] as to make the whole thing one. The new thing is a statute, which the arm was not."

Sohm's Institutes of Roman Law, p. 247.

"The same thing occurs, *e. g.*, when a new leg is put on a table, or when a rose is planted in my land. In the latter case, as soon as the rose has struck root, only *one* thing exists—viz., the land; the rose has ceased to exist as an independent thing. In all these instances one of the things maintains its identity in spite of the union. It determines the character of the new thing. It has, so to speak, absorbed and consumed the other. Hence, it is called the principal thing, in contradistinction to the accessory—*i. e.*, the thing (in the above cases, the arm, the rose) which continues to exist only as a modification or enlargement of the other by which it is absorbed. The rule of law here is that the owner of the principal becomes the owner of the accessory, which *his* thing has consumed. * * * The owner of the principal thing, therefore, becomes the sole owner of the new thing."

Sohm's Institutes of Roman Law, p. 247.

A severalty from the land of oyster bottoms is the worst fate that could happen to the oyster interests, as the supply is not, in its nature, universal. There can be no right to enter for the purpose of cleaning out oysters in the places where found, and, consequently, the general proposition cannot follow as a legitimate conclusion from the general right to navigate the waters. And so the argument returns to the

question of title; and, if our titles have deprived the State of any rights which are claimed for the State, it is personal to the State, and the Oyster Commission is prohibited by the tenth section of Act 178 of 1906, as held in the case of *Chauvin vs. Oyster Commission*, 121 La. 10, from interfering in the case.

Justice Abbott, in this vein, concludes:

> "So that even the privilege to be derived from ports cannot be in its nature universal. And, as to ports, Lord Hale (Ch. 6, p. 73) distinguishes between the interest of property and the interest of franchise, and says: 'If A hath the ripa, or bank, of the port, the king cannot grant liberty to unlade on the bank of or ripa without his consent, unless custom hath made the liberty thereof free to all, as in many places it is.' Now, such consent, as applied to the natural state of the ripa, or bank, would be wholly unnecessary, if every man had a right to land his goods on every part of the shore at his pleasure. And if there be no general right to unlade merchandise on the shore, there can be no right to traverse the shore with carriages, or otherwise, for the purpose of unlading; and, consequently, the general proposition to which I have alluded cannot be maintained as a legitimate conclusion from the general right to navigate the water."
>
> *Blundell vs. Catterall*, 5 B. & Ald. R. 268; Angell on Tide Waters, Appendix, p. xxxvii.

Justice Abbott, in *Blundell vs. Catterall*, says:

> "I have spoken of merchandise and not of fish. From the latter I studiously abstain, because no question of that kind is before the Court, and it is unnecassary to say anything upon it. It will be remembered, also, that I speak only of the general right,

which is a matter perfectly distinct from those cases of necessity that often arise out of the perils of navigation. Having thus shown that the general proposition cannot, in my opinion, be maintained, I return to the particular right or privilege claimed in the present case.

"One of the topics urged at the bar in favor of this supposed right was that of public convenience. Public convenience, however, is in all cases to be viewed with a due regard to private property, the protection whereof is one of the distinguishing characteristics of the law of England. It is true that property of the description of the present is, in general, of little value to its owner; but I do not know how it is ever to be increased, if such a general right be established."

Blundell vs. Catterall, 5 B. & Ald. R. 268; opinion of Abbott, C. J.

The lease system is destructive of common rights. Constitution of Louisiana, Arts. 46, 58, 195, 48, par. 13, Section 11, setting out this lease system, and all other parts of the act relevant thereto, would be unconstitutional if attempted to be put into effect or force against us as owners of our properties.

"The Precepts of Justinian," as said in the opinion of Watkins, J., in *Morgan vs. Nagodich*, 40 An. 253, recognize:

"Wild beasts, birds, fish, and all animals bred either in the sea, the air or upon the earth, so soon as they are taken, become by the law of nations the property of the captor; for natural reason gives to the first occupant that which has no previous owner."

Justinian, Lib. 11, T. 1, p. 12.

The opinion in *Morgan vs. Nagodich,* 40 An. 253, proceeds to say:

> "The statute quoted accords to the owner of the land which any river, bay, lake, bayou, cove, inlet or pass makes into or runs through * * * the exclusive right to use said body or bodies of water for planting oysters and other shellfish."

The landowner represents the true interests of society in every country. The law of accession gives to the owner of the lands submerged not only the land and the benefits of the waterfront, but the ownership of all things directly above and under it, and that are incident to or become incorporated with the property. The owner of the waterfront which sustains and is subject to the rights of the public for passage and navigation and other purposes of a public nature shall be protected in the enjoyment of all other advantages that are recognized, as we have seen in this second section of the act of 1886. The person who bears the burden is entitled to reap the benefit: *"Qui sentit onus sentire debet et commodum."* It is an advantage which the front proprietor, without the necessity of public license, naturally enjoys from the situation of his property, and not a violation of law or permit depending on the consent of a political power or the largess of the Oyster Commission, or from which we are debarred, save on condition of enjoying the privileges in conformity with the lease system proposed by Act 52 of 1904, Sections 10-17, and Act 178 of 1906, Sections 10, 13, 15, 16, 17. The act specifically prescribes we shall not be debarred, but imposes its operation upon our property in violation of our vested rights and impairment of the obligations of contract imported by our patents.

The right of the owners of these lands to the exclusive facilities attached to them for oyster growth and development, under the provisions of the Civil Code, exists without restriction of any kind, and the statutes are confirmatory and only declaratory of the right as existing by operation of the general provisions of law on the subject. This principle is again declared in the prohibition enacted in the act (that of 1906, Section 10) against the Oyster Commission undertaking to question or attack private titles of front proprietors.

The Civil Code of Louisiana recognizes the right to maintain and keep private fishponds, and to private, exclusive ownership of fish, as in the case of pigeons, bees or fish which go from one pigeon-house, hive or fishpond to another, and belong to the owner of those things, provided they have not been attracted thither by artifice, so there is nothing in the law preventing the erection of private fishponds. The oyster is not so necessarily a subject of common solicitude that it should be taken out of the list of things susceptible of ownership.

> "Things are either common or public," etc.
> C. C., Art. 449.

> "Things susceptible of ownership belong to corporations or they are the property of individuals."
> C. C., Art. 440.

> "Things which are common are those the ownership of which belongs to nobody in particular, and which all men may freely use conformably with the use for which nature has intended them, such as air, running water, the sea, and its shores."

Article 452 of the Civil Code provides that, while the use of the banks of navigable streams is public, nevertheless the ownership of river banks belong to those who possess the adjacent lands. Natural conditions are proclaimed for the peculiar use of the soil.

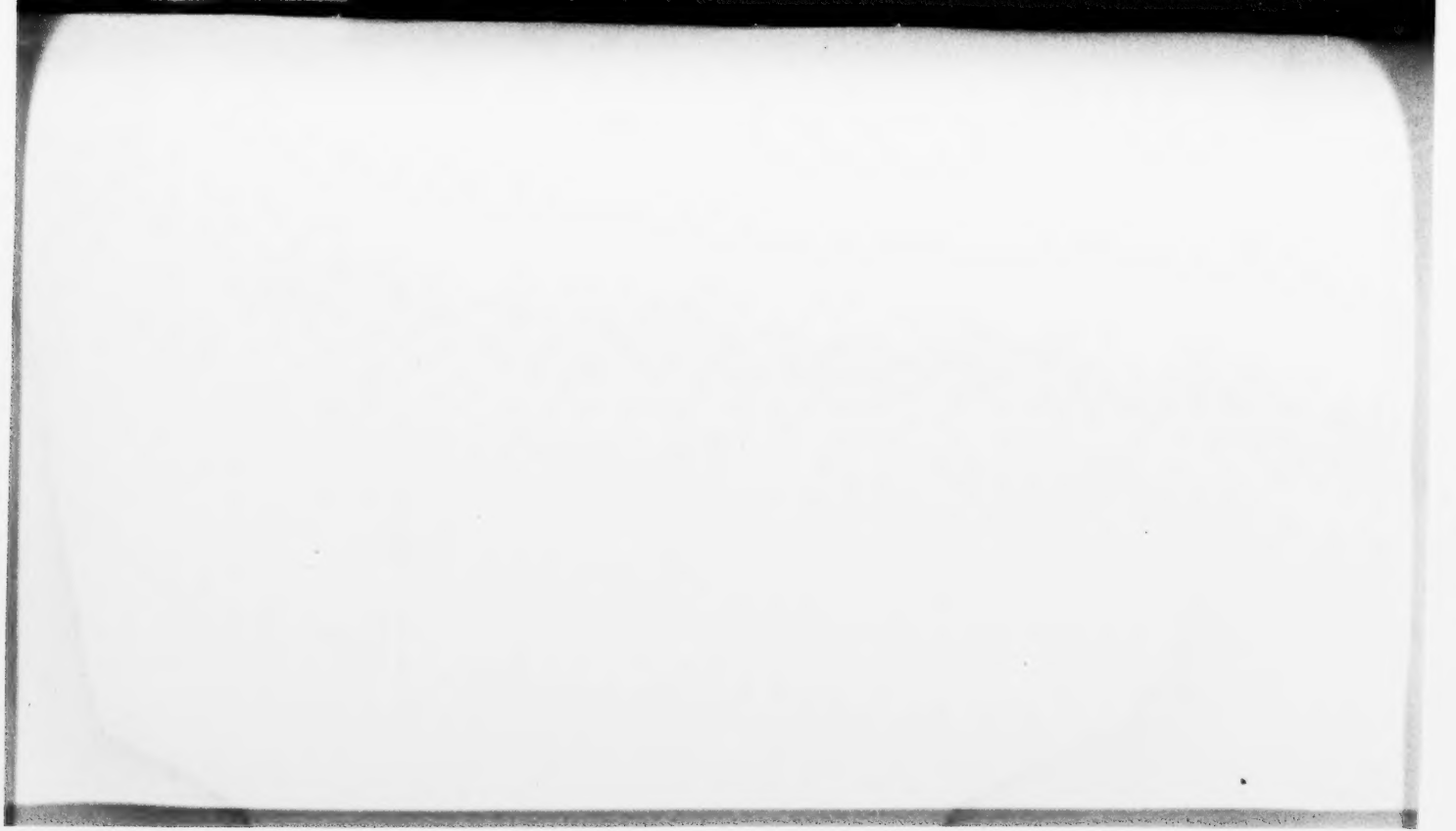
We ask that the judgment of the Supreme Court of the State of Louisiana be reversed, with directions to the Supreme Court of Louisiana to enter a judgment in favor of the plaintiff in error, in conformity with the views and judgment of this Court.

Respectfully submitted,

J. C. GILMORE,
E. N. PUGH,
THOS. GILMORE,

Attorneys for Louisiana Navigation Company, Limited, Plaintiff in Error.

APRIL 16th, 1912.



LOUISIANA NAVIGATION COMPANY,

Plaintiff in Error,

vs.

OYSTER COMMISSION OF LOUISIANA, ET AL.,
LIAN CANNING COMPANY, AND [illegible]
LOPEZ & DUKATE COMPANY,

Defendants in Error.

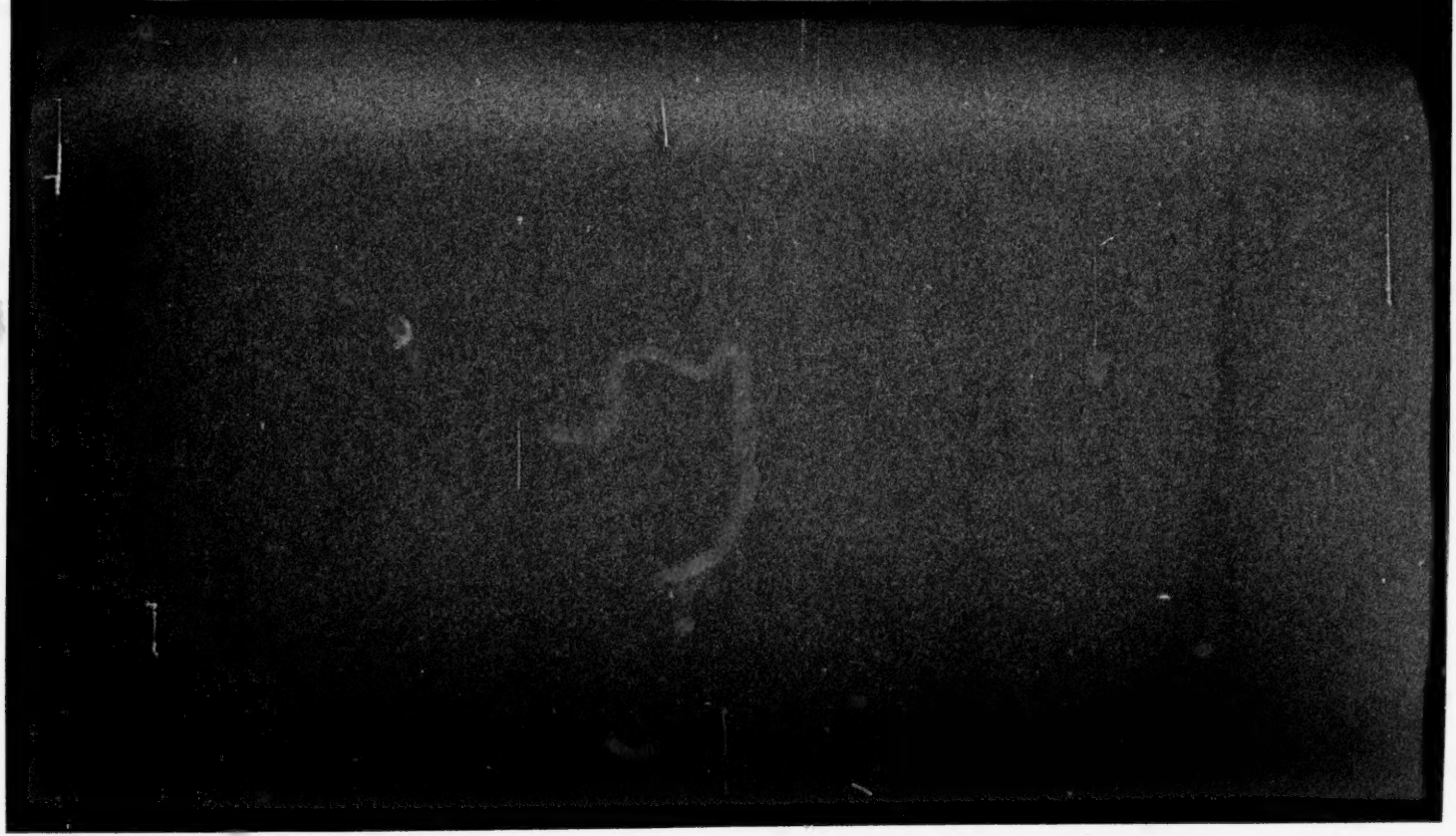
BRIEF FOR PLAINTIFF IN ERROR.

Supplemental Argument in Opposition to Motion to Dismiss.

J. G. [illegible],
THOMAS [illegible],
EDWARD [illegible],

Attorneys for Louisiana Navigation Company, Plaintiff in Error.

J. G. Harris, "The Legal System," [illegible]



Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 518.

LOUISIANA NAVIGATION COMPANY, LIMITED,
Plaintiff in Error,

versus

OYSTER COMMISSION OF LOUISIANA, E. C. JOULLIAN CANNING COMPANY, and DUNBARS, LOPEZ & DUKATE COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Supplemental Argument in Opposition to Motion to Dismiss.

STATEMENT OF THE CASE.

This is a suit by plaintiff and appellant, the conceded owner and possessor of the lands hereinafter described, against the Oyster Commission of Louisiana and its

licensees, defendants and appellees, to prevent the said defendants from disturbing and trespassing on, and disturbing and molesting plaintiff in its ownership and possession of, said lands.

To this suit defendants filed an exception of no cause of action, a plea the equivalent of the common-law demurrer. This exception was sustained in its entirety by the District Court, and plaintiff's suit dismissed. From this judgment of dismissal plaintiff prosecuted and perfected a suspensive appeal to the Supreme Court of Louisiana. That Court maintained the judgment of the lower Court in so far as the greater portion of plaintiff's suit is concerned, thus making that portion of the judgment of the Court *a qua final and irrevocable.* In so far as the judgment of the Supreme Court affirmed the judgment appealed from, plaintiff's petition and prayer stand dismissed, and the matters and issues therein affirmed are entirely and absolutely out of the case. From the judgment of the Supreme Court of Louisiana plaintiff prosecutes this appeal.

Defendants have made a motion to dismiss, contending that the judgment appealed from is not *final;* hence, no appeal lies.

ARGUMENT.

The short question presented on this motion to dismiss is whether a final judgment or order had been entered by the Supreme Court of Louisiana which could be appealed to this Honorable Court.

If the judgment or order appealed from is not final, then we readily concede (and this is settled not only by the terms of the law itself [R. S. U. S., Sec. 709], but by the unbroken jurisprudence of this Court) that the motion is well taken.

The finality *vel non* of the judgment appealed from is to be settled and determined by the effect given to it under the law of Louisiana and the established procedure thereunder as laid down and expounded by the Supreme Court of Louisiana.

In *Belmont Bridge vs. Wheeling Bridge*, 138 U. S. 290, this Court, speaking to this point, says:

> "The judgment appears to have been considered by that Court as so far final as to justify an appeal from it; and, if the Supreme Court of a State holds a judgment of an inferior Court of the State to be final, we can hardly consider it in any other light in exercising our appellate jurisdiction. The motion to dismiss must, therefore, be denied."

Again, in *Southern Ry. Co. vs. Postal Telegraph Co.*, 179 U. S. 643, this Honorable Court, in commenting on the case above cited, says:

> "Reference is made to *Wheeling & Belmont Bridge Co. vs. Wheeling Bridge Co.*, 138 U. S. 287, in which this Court sustained its jurisdiction of a writ of error to the Supreme Court of Appeals of West Virginia, and inquired into the validity of a judgment of that Court, affirming an order of a trial Court appointing commissioners under a somewhat similar statute. But that decision was based on the fact that the order of the trial Court had been held by the State Supreme Court to be a final judgment on which a writ of error would lie, and, therefore, being a final judgment in the view of the highest Court of the State, it ought to be considered final here for the purposes of review."

In the case at bar it is undisputed that the judgment of the District Court sustaining the exception of no cause of action was final; *ergo*, an appeal lies. The result of this

action by the trial Court was to dismiss in its entirety plaintiff's suit. If the Supreme Court of Louisiana had affirmed the judgment appealed from, then the judgment of the lower Court, *eo instanti*, would have become final and irrevocable. The Supreme Court of Louisiana in the exercise of its appellate jurisdiction had the power, right and authority either to affirm, modify or reverse the judgment appealed from or to render such judgment as in its opinion the lower Court should have given. (Code of Practice of Louisiana, Article 905.)

The Supreme Court in this case as to certain demands of plaintiff sustained the judgment of dismissal of the District Court, thus making the judgment below final and entirely eliminating from further discussion or controversy to that extent plaintiff's petition and prayer. It is contended, however, that from the fact that the Supreme Court remanded the cause for a specified purpose, and for no other, the effect of this is to take away from the issue decided its finality and to reopen the case in its entirety on all issues propounded by plaintiff in its petition. This result we imagine is reached on the theory that the judgment is indivisible and the issues cannot be severed. The test of the finality of a judgment is whether or not the matters decided can be again raised or questioned. Applying this test to the judgment rendered by the Supreme Court of Louisiana, it is self-evident that, as to the issues dismissed by the lower Court and affirmed by the Supreme Court, plaintiff can never, in any shape, manner or form, dispute the correctness of that judgment. Those issues have passed into the domain of *res adjudicata*, and are forever foreclosed and ended. This question has, however, been passed on and decided by the Supreme Court of Louisiana, and the principle

laid down that the fact that only part of the demand is dismissed does not prevent the plaintiff appealing from the judgment so dismissed in part.

In *State ex rel. Ikerd*, 35 An. 213, the Chief Justice being the organ, the Court says:

> "The relator avers that he has brought a suit on certain grounds against these defendants, who excepted thereto for certain reasons; that the District Judge, after hearing, sustained the exceptions to *a certain extent* and dismissed part of the petition and prayer. He complains that he applied for a devolutive appeal, which was refused him without cause, and prays for mandamus.
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> "The District Court returns that he has twice refused to grant the appeal, which was from an interlocutory judgment.
>
> "FIRST. Acquiescence. * * *
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> "SECOND. Because the judgment on the exceptions was an interlocutory decree, and not such as would work irreparable injury to plaintiff, and because to grant the same before the trial of the whole case would be to send the case to the appellate Court in fragments, a proceeding not favored by law.
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> "The judgment sustaining the exceptions and dismissing the petition and prayer *is not an interlocutory order*. It is a judgment which has the character of finality, as it severs and *dismisses from the action part of the demand*. It was so considered by the District Judge, who has, after rendition, read and signed it in open court.
>
> "Whether under that judgment the plaintiff in the suit be debarred from bringing or not a new proceeding, it is unnecessary to determine. It is enough that the judgment be a final judgment to entitle the relator to an appeal from it. By not doing so, the relator might sustain some injury eventually irreparable. It is no

objection to the *granting of the appeal that the case remains pending on certain grounds before the Court.* It may be ultimately unfortunate that the judgment of dismissal be reversed, and that it may so possibly cause a reversal of the judgment eventually to be rendered in the cause as it now stands in court; but with that neither the relator nor the Court has any concern. Injury, if any is thereby occasioned, will have to be sustained by the defendants, who excepted in the manner they did, and who obtained the judgment complained of.

"They might have avoided such judgment by either asking and obtaining that the exceptions be tried at the same time with the merits, or by objecting to the introduction of evidence at the trial. They have elected these proceedings, and must abide the consequence of that choice. The theory that a judgment is an entirety and indivisible can receive no application when distinct judgments are rendered at different times and on different subjects. In a proper case an appeal lies from each judgment so rendered. It is settled that an appeal lies from a judgment of dismissal or nonsuit. (2 M. 136; 7 M. 520; 3 N. S. 265; 16 L. 515.)" (Our italics.)

It is certain that, under the judgment of the Supreme Court, plaintiff has had adjudged against him a final decision as to all the lands covered or submerged by water, and, as it contends, covered and included in its deeds of sale and purchase. If this judgment stands, plaintiff's claim is reduced to the proof of ponds and wet spots within the borders of the dry lands. Its entire title to the lands covered by water, and constituting the major portion of its demand, constituting its only value, is declared and adjudged to be of no virtue, force or effect. Plaintiff is absolutely deprived of all of its lands covered by water without the further opportunity of contesting the correctness of this decree unless relief comes from this Honorable Court.

We confess to be unable to conceive in what respect or how this judgment, distinctly, clearly and emphatically decreeing and adjudging that plaintiff has no title to thousands of acres of land covered by water, lacks finality. It is clear that as to this portion of its claims and demands plaintiff is quit, now and forever, unless the judgment of the Supreme Court is reversed.

What did the Supreme Court of Louisiana hold and decide? The opinion and the decree speak for themselves. Mr. Justice Monroe, as the organ of the Court, says:

> "The position of the plaintiff as developed in the argument of the case is that its patents to fractional sections carry with them title to all the land in the sections submerged as well as dry, and (from the argument) we understand its particular complaint to be that the Oyster Commission and its licensees have been, and are, interfering with its use and enjoyment of the submerged portions of the sections in question (especially those lying beneath the waters of Creole Pass and Grand Pass) by removing oysters therefrom, and by threatening it (plaintiff) with the penalties of the law for dealing with those lands as its own. * * * The other ground (relied on by all the defendants) is that the submerged lands are not included in plaintiff's patents, and that, after having exhibited these muniments of title as part of its allegations as owner, plaintiff has put itself out of court."

The above excerpts sharply define the issue between plaintiff and defendants arising on the exception of no cause of action, which, for the purposes of the trial of that exception, admit as true all the facts well pleaded and set out by plaintiff, but deny the legal conclusions arising therefrom.

Hennen's Digest Louisiana, Vol. II, p. 1169; Tit.: Pleading VI (c), 3, 4.

On these issues the Court said:

> "We conclude, then, that the grants which plaintiff claims, being of land bordering upon and partially surrounded by the tide water of the Gulf of Mexico, carry its titles no further than high-water mark, and that, in so far as it (plaintiff) asserts ownership and possession under such titles of land lying beneath the waters which surround the tracts of dry land included in said grants or lying beneath any navigable passes or channels which intersect such tracts or separate them from each other, the exception of no cause of action was properly maintained. * * *
>
> "Moreover, it seems not unlikely that there may be nonnavigable streams, pools, ponds and wet places so insignificant in dimensions and so within the borders of the dry land covered by plaintiff's grants as that plaintiff would be entitled to hold them as included therein (see *Burns vs. Crescent Club*, 116 La. 1038), and yet with respect to which defendant may entertain a different opinion, and may hereafter assert that the judgment appealed from constitutes *res judicata*."

The decree reads:

> "It is therefore ordered, adjudged and decreed that the judgment appealed from be set aside, and that this case be remanded to the District Court, to be there proceeded with *in accordance with the views expressed in this opinion*." (Italics ours.)

The case was remanded for the single purpose of being tried "*in accordance with the views expressed in this opinion.*" Under this decree all question as to plaintiff's title under its patents to the land covered by water and to land surrounded by water was entirely eliminated, and as to this demand plaintiff had a final judgment against it. All that

plaintiff could possibly litigate on the remand was as to the existence of nonnavigable streams, pools, ponds and wet places *within the borders of the dry land covered by plaintiff's grant.*

We submit that the judgment appealed from was in every sense final, and the motion to dismiss should be denied.

II.

The subject-matter of this litigation is the title to "swamp and overflowed lands" donated by the Government of the United Sates to the State of Louisiana for the purposes of reclamation. (Act of Congress, September 28, 1850, C. 84, Stat. 519; Secs. 1 and 2 of the act of March 2, 1855, C. 147, 10 Stat. 634; 127 U. S. 183, *United States vs. Louisiana.)* Plaintiff and its authors claim title to certain specified lands set out and described in the patents from the State, the said lands being described in the deeds as *"swamp land subject to overflow."* The nature and character of these lands are definitely settled by law, and this fixed status is not subject to revision by the Courts.

From the very nature of things these lands are partially or entirely covered by water; otherwise, they could not possibly fall within the category of *swamp and overflowed lands* under the "swamp-land grant." The fact that lands are covered by water does not make them any less land, or, as tersely put in *Regina vs. Liverpool Co.*, 7 Ad. & El. 685, "lands are not the less lands for being covered with water."

The defendants admitting as true all the facts alleged by plaintiff, the question of the right of riparian proprietors is foreign to the issues presented in this case. The clear-

cut issue sharply drawn is as to the extent of plaintiff's lands under and through the patents, evidencing the purchase by it and its authors of lands from the State of Louisiana. It is admitted that plaintiff is, and has been, in possession for more than thirty years of the lands claimed by it. The State of Louisiana, under its great seal, granted, sold and deeded to plaintiff so many sections of land, and it is these lands alone plaintiff claims. Plaintiff relies on its patents as its muniments of title, and is simply seeking to be left in the undisturbed ownership and possession of its lands. The Oyster Commission and its licensees, defendants, are endeavoring to oust plaintiff, and up to now have succeeded.

In the supplemental petition filed by plaintiff in obedience to the order of the District Court the lands are described as being originally derived by its author from the State of Louisiana and conveyed to or acquired by mesne conveyances by petitioner, and comprising the northeast extremity or end of the peninsula of St. Bernard as outlined and defined in the "boundary case" between the States of Louisiana and Mississippi in Volume 202 of the United States Supreme Court Reports at page 1 *et seq.*, establishing the boundary between the two States; that the said part of the said peninsula is also known, as appears by the said "boundary case," as Isle à Pitre, or the Louisiana coastline, the said decision showing the "thalweg," or boundary, to run between the said Isle à Pitre and Cat Island. Petitioner shows that its possession embraces the whole of the territory known as "Isle à Pitre" and the lands in the annexed transfer made part hereof; that the several sections and fractional sections of land or upland and land under water therein set forth adjoin and form one piece of block of swamp and overflowed

land continuously or diagonally in the sections or fractional sections described through Township 10 S., Range 20 E.; Township 11 S., Range 20 E., and into Township 12 S., Range 20 E., and Section 13 in Township 11 S., Range 19 E., all in the Southeastern Land District East of River, Parish of St. Bernard, Louisiana, of which plaintiff holds possession, as set forth in the said several patents and mesne conveyances, as will be shown on the trial of this case; that petitioner files herewith a diagram of the whole of said property and a copy of a map of the State Land Office of the said Township 10 S., Range 20 E., showing the said islands and a portion of said land in Township 10 S., Range 20 E., certified "New Orleans, 19 May, 1867, State Land Office, Ad. Dupre, Register," and the United States Coast Survey chart No. 190, issued November, 1887, and refers to the several maps or charts contained in the transcript, and report of the decision of the said *Boundary case*, 202 U. S. 1, showing in detail the location of the places known as "Creole Gap," in Township 10 S., Range 20 E., and Township 11 S., Range 20 E., and "Grand Pass," in Township 11 S., Range 20 E., lying within the limits and area of petitioner's survey and the said patents, and showing the boundaries of said property and petitioner's possession and enjoyment of the said property, with all rights of accretion, advantages and appurtenances thereto belonging or in anywise appertaining.

Turning to the *Boundary case*, 202 U. S. 1, we find that, in order to establish ownership of the State of Louisiana as against the State of Mississippi to these very lands, the plaintiff, the State of Louisiana, introduced and used as part of her evidence the patents granted by said State to the plaintiff in this suit, and proved that plaintiff and its authors had been in possession of the lands for more than fifty years. As to these lands this Court said:

"Mississippi denies that the peninsula of St. Bernard and the Louisiana marshes constitute a peninsula in the true sense of the word, but insists that they constitute an archipelago of islands. Certainly, there are in the body of the Louisiana marshes or St. Bernard peninsula portions of sea marshes which might technically be called islands, because they are land entirely surrounded by water; but they are not true islands. They are, rather, as the Commissioner of the General Land Office wrote the Mississippi Land Commissioner in 1904, 'in fact, hummocks of land surrounded by the marsh and swamp in said township. * * * The southern portion of Louisiana is geographically of an alluvial formation containing the delta of the Mississippi River. The peninsula of the Parish of St. Bernard is practically a part of this delta formation." * * *

Speaking of Isle à Pitre the Court says (p. 55):

"Isle à Pitre was composed of certain enumerated sections of Township 10 S., Range 20 E., and these lands were approved to Louisiana by the Commissioner of the General Land Office of the United States May 6, 1852, as forming part of the State, and they were subsequently patented, sold and conveyed to various individuals, the chain of title extending from 1852, a period of over fifty years. The lands forming Isle à Pitre have been paying taxes to the State of Louisiana for years. * * * This territory consisted, as heretofore stated, of what was known as the Louisiana marshes, and it is admitted that they have immemorially been known by that name, though some of the witnesses for Mississippi said that they were known as 'Grand Marshes,' admitting, however, that they were quite as frequently called the 'Louisiana Marshes.'

"All the maps, outside of the allegations of plaintiff and its patents, conclusively show that all the lands sold by the State of Louisiana to plaintiff and its au-

> thors were duly surveyed and divided into sections in accordance with the laws of the United States. The Isle à Pitre was composed of certain-enumerated sections of Town 10 S., Range 20 E., and these *sections* were sold by the State of Louisiana to plaintiff's vendors. All the patents recite that the lands in question were sold to plaintiff's authors according to the official plat and survey of said lands in the State Land Office."

This recital reads into and makes the survey a part and portion of the plat.

> *Cragin vs.* ——, 128 U. S. —; *McDade vs. Bossier Levee District*, 109 La. 627.

The Supreme Court of Louisiana says:

> "The survey referred to seems to have been made in 1845."

In other words, prior to the donation to the State of these lands the United States Government in the usual method had all these lands surveyed and regularly plotted into sections. The State adopted those surveys, and all the title she ever acquired is based on plans from these surveys. The State sold under the same description and under the same surveys that she acquired theretofore, and it holds to reason and as a logical sequence that she sold all that she acquired from the Government. If under these descriptions the State acquired nothing but the dry land, then the land covered by water, a part of the Louisiana marsh, does not belong to her, and she has no right or interest in ousting plaintiff from lands to which she has not a particle of title.

The title of the State to the lands covered by water arises from the surveys made by the Government, and, selling under these surveys, she has parted with all interest in and to

the lands so far as included in the surveys. We assume as a self-evident proposition that if A acquires property by a deed of sale containing a full description of the property, and subsequently he sells and transfers this identical property to B under the precise and identical description that he bought, B necessarily acquires all that A did under his deed. B stands in the shoes of A, and the measure and extent of what he acquired is to be settled and fixed by the descriptions in both deeds; and, being identical in both deeds, A has parted with all that he originally acquired.

What lands were donated by the United States Government to the State of Louisiana under the marsh-land grant? Did the State only acquire the number of acres mentioned in the patents, or did she acquire the entire sections therein designated?

It is a well-recognized rule of conveyancing both in the civil and common law that the *metes* and *bounds* control the *quantity*. The patents in this case describe the lands as Sections No. —— an dfractional Sections No. ——. The donation by the Government to the State is of *sections of land*, and the mention of quantity therein is not a controlling feature, but a mere *incident* of the deed, and not of its essence. The enumeration of the property as Sections Nos. ——is the *very life of the deed*—the entire crux of the matter—and undoubtedly controls, irrespective of the fact that there is a further recital as to the quantity. If the Government intended only to donate the *"dry land,"* as now contended, the deed could easily have been so worded as to convey this meaning. Had such been the intention, the description would have been: "So many acres lying and being in Sections ——."

The sale of sections unreservedly and without restriction most undoubtedly conveys *all* the land in the sections. This

is true as an ordinary rule of construction, and it is still more emphasized and accentuated when the conveyance is made with reference to an official plat of survey which is read into the deed.

109 La. 128; 140 U. S. 380.

As we have already stated, all the patents in this case were made with reference to and in accordance with an official plat of survey on file in the State Land Office, being the official survey of these lands made by the United States Government prior to the donation to the State.

Speaking of these surveys the Supreme Court of Louisiana in *McDade vs. Bossier Levee District,* 109 La. 627, adopts the views of this Honorable Court in *Hardin vs. Jordan,* 140 U. S. 371, where this Court says:

> "It has been the practice of the Government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream or other body of water The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines."

This whole question came up squarely in *Tolleston Club vs. State* (Ind.), 38 N. E. 217, and, as it covers the case at bar like a blanket, we shall quote it very fully as part of our argument. In that case the Supreme Court of Indiana says:

> "The term 'fractional' as applied in the sections named in the patent refers simply to the circumstance that they do not contain 640 acres of dry land. As we have seen, the sections were fully surveyed, the corners and boundary lines were determined and recorded

in each instance. It follows from what we have already stated, and from the authorities above cited, that the conveyance of the fractional sections carried title to the boundary lines of the sections. All was conveyed. There remained to the United States neither upland nor lowland, whether exposed to the surface or covered by the waters of the marsh or the river. The State took to the section lines. * * * If the State sold the sections by their number simply as given in the General Land Office list, or as fractional sections as named in the patents from the United States, there would be little question that the entire sections were conveyed. Even if the parts between the meander lines were all sold, as some of them were, as quarter or quarter-quarter sections, or by some other exact subdivision, there would be as little doubt that the subdivisions would be fully conveyed. This counsel tacitly admit. But because the sales made by the State were in most cases by lot numbers it is argued that only the dry land outside the meander line was conveyed. As already stated, a meander is not a boundary unless expressly made so. But, by the admissions made at the trial and from an examination of the State patents in the record, it appears that the meander line was not made a boundary line in the sales made by the State. On the contrary, the State in making its sales adopted the plats and lot numbers of the United States survey, with dimensions, acreage and numbers all as made in the original survey of 1834. It seems very clear that whatever the State received from the United States she conveyed fully in her patents to the purchasers of the same lands all described as in the surveys upon which she bases her own claims to the land."

7 Wall. 274.

This Honorable Court in *Kean vs. Calumet Canal Co.*, 190 U. S. 452, through Mr. Justice Holmes, on this question says:

"It is said that the land under water was not embraced in the survey of 1834. It would seem from the plat and the field-notes that the sections and dividing lines were clearly marked off and posts set. The case is similar to *Kean vs. Roby*, 145 Ind. 221, where the survey was pronounced sufficient. No difficulty was felt on the ground that the survey did not cover the submerged land in *Harden vs. Jordan*, 140 U. S. 371. But, furthermore, the land was selected as 'swamp and overflowed lands' by the State. It not appearing otherwise, the selection must be presumed to have included the land overflowed; and, if so, it was confirmed to the State by the act of March 3, 1857, C. 117, 11 Stat. 251 (Rev. Stat., Sec. 2484). The confirmation encounters none of the difficulties of *Stoneroad vs. Stoneroad*, 158 U. S. 240. The land surrounding the water at least was surveyed, so that the description of the submerged portion was absolute. We are of the opinion that the State of Indiana got a title to the land in dispute. If the State of Indiana got a title, it gave one. There is not much controversy on this point."

Ill. Cent. R. R. vs. Chicago, 176 U. S. 660.

We can add nothing to the cogency or force of our position in this case as reasoned out by the Supreme Court of Indiana. The dissenting opinion of Mr. Justice Provosty, of the Supreme Court of Louisiana, in the instant case is in exact line with this doctrine. This dissenting Judge holds that

"the case ought to be tried on the merits, and the plaintiffs be allowed all those parts which have been patented to the State by the United States Government and by the State to plaintiff as land."

The majority of the Supreme Court of Louisiana, we most respectfully submit, beg the sole issue in this case by

assuming, in spite of the record (see maps and 202 U. S. 55) that

> "the grants under which plaintiff claims, being of land bordering upon and partially surrounded by the tide water of the Gulf of Mexico, carry its titles no further than high water."

This presents a moot question with the correctness of which plaintiff has no concern. Plaintiff asserts ownership and possession of land lying beneath the waters which surround the tracts of dry land included in said grant, or lying between passes or channels which intersect such tracts or separate them from each other. Plaintiff claims, and we submit that it is conclusively shown by the surveys, maps and charts and the *Boundary case* made part and portion of its petition, that it is entitled to all the land, whether covered by water or not, within the boundaries of its sectional lines, and that its patents cover all the land within the sections sold us. The status, volume and character of its land have been irrevocably and unalterably fixed by the surveys. Its lands are situated in the Louisiana marshes, have been regularly surveyed, donated to the State by sections, and sold to it by sections. As said in the *Boundary case*, 202 U. S. 55:

> "Isle à Pitre was composed of certain enumerated sections of Township 10 S., Range 20 E., and these lands were approved by the Commissioner of the General Land Office May 6, 1852, as forming part of that State, and they were subsequently patented, sold and conveyed to various individuals, the chain of title extending from 1852, a period of fifty years."

The lands, of course, are subject to tidal overflow (the patents so recite), but we cannot perceive by what process

of reasoning or logic the Supreme Court of Louisiana reached the conclusion that these lands are not subject to private ownership under the record presented in this case. The State as our vendor sold us certain enumerated sections of land, and is bound by her warranty to defend her own title.

Civil Code of Louisiana.

The State is clearly estopped by her obligation of warranty from taking the position that lands sold by her are not susceptible of private ownership. Such an attack is repulsed by the maxim of *"Quem de evictione."* Our Supreme Court has always held that the State, as to estoppel resulting from sales and contracts, is governed by the same rules as applicable to ordinary individuals.

23 An. 272; 121 La. 720; 69 Fed. 123; 26 N. W. 419; 51 N. W. 103.

These lands, as a matter of fact, are not arms of the sea, but are lands constituting a peninsula surrounded by and in the Louisiana marshes. It is pertinent just here to propound the query: If the State only obtained *dry land* under the "swamp-land act," then what was to be reclaimed by building levees and digging drains? The very purpose of the grant, as clearly therein expressed (127 U. S. 182), was to have the lands covered by water reclaimed. No other lands but those covered by water and marshes were included in the grant.

Heath vs. Wallace, 138 U. S. 584.

As stated in the *Boundary case*, 202 U. S. 46:

> "Certainly there are in the body of the Louisiana marshes or St. Bernard peninsula portions of sea marsh which might technically be called islands, be-

> cause they are lands surrounded by water; but they are not true islands. They are, rather, as the Commissioner of the General Land Office writes the Mississippi Commissioner in 1904, 'in fact, hummocks of land surrounded by the marsh and swamp in said township.' "

Under the judgment appealed from, plaintiff's ownership is confined and restricted to the "hummocks of land," and these are the only lands acquired by it under its patents. It is passing strange that the Government of the United States, under its beneficent policy, only donated to the State of Louisiana hummocks of land situated in these sections. We cannot conceive that such construction of these grants will be allowed, but this construction is bound to follow if the judgment of the Supreme Court of Louisiana is correct. Plaintiff is the owner of all that the State acquired from the Government in so far as the lands were sold by the State to the plaintiff.

Again, the Supreme Court of Louisiana has recognized that, where the land is intersected, and the owner has land on both sides, the exclusive right to plant oysters in the stream thus intersecting belongs to the owner.

Act No. 106, p. 197, of 1886, of the General Assembly of the State of Louisiana, *declared* in Section 2:

> "If any river, bay, lake, cove, inlet or pass makes into or runs through the land of any person, and is comprised within the limits of his lawful survey, such person or other lawful occupant shall have the exclusive right to use said bodies of water for planting oysters and other shellfish."

The right accorded by special statute is only a confirmation of that established already by the civil law; and,

even if it did not exist, the State as a sovereign has the right to regulate, lease, give or grant exclusive use of the oyster fisheries in its navigable rivers to its subjects or citizens, even where such fisheries are natural reefs.

16 Pet. 257, 258, 266, 370; 1 How. 103; 3 How. 220; 7 How. 556; 9 How. 370; 15 How. 433, 452; 3 Wall. 726; 6 Wall. 436; 4 Otto, 338, 394; 15 Otto, 491; *Huntington vs. Lowndes*, 153 U. S. 33.

In *Morgan vs. Nagodich*, 40 An. 246, this statute being before the Court, it was held:

> "The statute quoted accords to the owner of the land which any river, bay, lake, cove, inlet or pass makes into or runs through * * * the exclusive right to use said body or bodies of water for planting oysters and other shellfish. This lands seems to have been recognized as a part of the public domain, and as such the plaintiff sold it to the plaintiff's vendors. The Legislature has by strong implication recognized the right of property therein as vested in private individuals. The District Judge was of the opinion that Bayou Cook was not an arm of the Gulf of Mexico, and that its banks formed no part of the seashore. *Held*, the land in question was not common property, but was susceptible of private ownership, and we are of the same opinion.
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> "The evidence shows that the lands of which the plaintiff claims ownership and possession were sold by the State anterior to the enactment of Act 106 of 1886. Hence, the bed of the bayous, creeks, lakes, coves and seashore bordering on the Gulf of Mexico, and embraced within the calls of plaintiff's authentic title, may not be used as a common by the defendants for the purpose of fishing and taking and catching of oysters and other shellfish; but the plaintiff, on the

> contrary, has the exclusive right to use the bays, lakes, coves, inlets or passes which make into or run through his land, or may be comprised within the limits of his lawful survey, for the purpose of *planting* oysters and other shellfish."

This section contains a clear-cut admission by the State that beds of rivers, bayous, etc., had entered into commerce, and had heretofore been sold by the State. The binding effect of these sales and conveyances was expressly recognized and declared to be in full force and effect.

It is true that Act 106 of 1886, page 195, was subsequently repealed; but it is too clear for argument that this repeal could not affect vested rights already acquired.

The Supreme Court of Louisiana is pleased to say:

> "As the case is presented, the location of Creole Pass is a matter of guesswork, and we are not informed, even by allegation, whether either of the passes mentioned in the petition is navigable or otherwise."

In the first place, the Court is in error in calling it "*Creole Pass.*" It is known as "*Creole Gap,*" it being a gap cut through plaintiff's lands. In the next place we do not think that the navigability or nonnavigability enters into the discussion so far as the ownership is concerned. If navigable, the fee in the land would be subject to the easement of navigability; but the fee would only be burdened to that extent. Again showing that this gap intersected its lands, the burden of showing navigability, if this has anything to do with the matter, would be on the defendants. As stated in 116 La. 1038, "a stream is not navigable unless its navigability is shown by evidence—*i. e.*, the navigability is a question of fact." This is purely a matter of defense.

"That is certain which can be made certain," and the allegations of plaintiff's petition, coupled with the maps, surveys, etc., attached and made part of its petition, show beyond all question the location of Creole Gap.

Plaintiff alleges that the said lands are submerged and swamp overflowed lands, and embraced the place known as "Creole Gap" in Section 32, Township 10 S., Range 20 E., and Sections 4 and 5, Township 11 S., Range 20 E., on the official plat of the said lands in the United States Land Office, and other water bottoms in the limits of petitioner's survey, extending across at the extreme western end of petitioner's land to the western section lines of Sections 6 and 7, embracing the place or small pass known as "Grand Pass" in the said Sections 6 and 7, in Township 11 S., Range 20 E., as distinguished from Grand Pass of the Gulf of Mexico aforesaid, or Mississippi Sound.

Patent No. 196 issued on the 20th of March, 1867, to Richard Pindell by the State of Louisiana for the following land:

> "The fractional Sections Nos. 27, 28 and 32 in Township 10 S., Range 20 E., in the Southeastern District of Louisiana, in the Parish of St. Bernard," etc., etc.

Patent issued for fractional west half of Section 4 and fractional northeast quarter of Section 5, in Township 11 S., Range 20 E.

Following the description given by plaintiff in its petition with the map in hand, Creole Gap is located with mathematical precision. By this map it is apparent that Creole Gap commences in Section 32 and intersects or runs through portions of Sections 4 and 5. The patents above recited make the plaintiff the owner of land on both sides

of Creole Gap. It cuts through plaintiff's land, and is its property, not only by the general law, but by express mandate and recognition of the General Assembly of the State of Louisiana by the act of 1886, No. 106, p. 195, and the construction placed on this act by the Supreme Court in the case of *Morgan vs. Nagodich*, 40 An. 246. Under this situation and under the law this gap cannot be treated as common property, but belongs to the plaintiff in its entirety, and, if navigable (of which there is not a scintilla of evidence), subject to the easement arising from this fact.

In its judgment the Supreme Court takes this property entirely away from plaintiff and gives it to the State.

We have set out somewhat in full the reasons why the judgment of the Supreme Court should be reversed, but more for the purpose of calling this Honorable Court's attention to the seriousness of the defenses in this case, and to ask that these questions be not decided on a motion to affirm, but only after full argument on the merits. Defendants base their motion to dismiss on the sole ground of the nonfinality of the judgment appealed from.

We submit that we have shown that the judgment is final, and the motion should be denied, for which relief we respectfully pray.

J. C. GILMORE,

THOMAS GILMORE,

EDWARD N. PUGH,

Attorneys for Louisiana Navigation Company, Limited, Plaintiff in Error.

No. [redacted].

FILED
SEP 27 19[redacted]
JAMES H. McKE[redacted]

IN THE

Supreme Court of the United States

October Term, 1910.

No. 22,123.

LOUISIANA NAVIGATION COMPANY, LIMITED,
Plaintiff in Error,

versus

OYSTER COMMISSION OF LOUISIANA, E. C. JOULLIAN CANNING COMPANY, AND DUNBARS, LOPEZ & DUKATE COMPANY,
Defendants in Error.

Brief of Argument of Plaintiff in Error on Motion to Dismiss in Reply to Brief of Oyster Commission of Louisiana, Defendant in Error.

J. C. GILMORE,
THOMAS GILMORE,
EDWARD N. PUGH,
Attorneys for Louisiana Navigation Company, Limited, Plaintiff in Error.

J. G. HAUSER, "The Legal Printer," 620-622 Poydras Street, N. O.

IN THE

Supreme Court of the United States

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OYSTER COMMISSION OF LOUISIANA, E. C. JOULLIAN CANNING COMPANY, AND DUNBARS, LOPEZ & DUKATE COMPANY,
Defendants in Error.

Brief of Argument of Plaintiff in Error on Motion to Dismiss in Reply to Brief of Oyster Commission of Louisiana, Defendant in Error.

I.

The position of the defendant in error, the Oyster Commission, has been materially altered or affected by the passage of the present "oyster law" since the filing of the writ of error, Act No. 189 of 1910, Acts of Louisiana. This act

relegates to a commission known as the "Board of Commissioners for the Protection of Birds, Game and Fish," organized under Act No. 278 of 1908, Acts of Louisiana, the duties of said commission being to attend to or regulate the oyster industry, etc. But, as the functions of the Board of Commissioners for the Protection of Birds, Game and Fish are narrowed to the object of protection of these sources of supply of game for sport or recreation or delicacies of food as animals *ferae naturae*, it is evident that the powers of the said commission could not be extended beyond the capacity or functions of the commission under the acts by which it was organized (Act 277 of 1908 and Act 278 of 1908). This commission, it is then all the more patent, has no authority to invade or attack title to lands, private property or land patents held by the plaintiff in error, and is substituted for the "Oyster Commission," which is subjected to the effect of repeal.

This is a statement in little of the extent of the interest of the defendant in error, which is entirely without authority to attack titles or take possession of or claim ownership in property of the nature of the titles of the plaintiff in error to its swamp and overflowed lands.

II.

This is a suit by the plaintiff in error to be quieted in the possession of certain lands known as swamp and overflowed lands, and constituting the extremity of the peninsula of the Parish of St. Bernard, Louisiana, known as Isle à Pitre, and adjoining lands which figure in the boundary case between the States of Louisiana and Mississippi (202 U. S. 1 *et seq.)*.

The lands were acquired by purchase from the State by sections and subdivisions of sections according to the official plats or maps of the Government surveys, and were obtained by the plaintiff in error from the original patentees.

The suit is coupled with an injunction against the defendants and a demand for damages and accounting for property carried off by defendants and a prayer for perpetual injunction.

The defendant filed a motion to dissolve the injunction and an exception of vagueness and no cause of action, and in the motion to dissolve the injunction or increase the bond to $15,851 set up all the defenses which they had to the case, which was substantially that it was public domain, with the administration of which the defendant Oyster Commission was vested by law. On this motion to dissolve and exceptions, which the plaintiff moved to have taken for an answer, the parties went to trial, and testimony was taken and evidence offered.

The plaintiff filed an amended petition in compliance with the order of the Court, which is copied *in extenso* in the opinion or decree of the case on appeal to the Supreme Court of Louisiana, and appears in the report of the case (125 La. —, 51 Sou. Rep. 708). (Rec., p. —.)

The case was subsequently dismissed in the court of first instance on a return by the Judge to the second exception of no cause of action or demurrer, which was repeated by the defendants, without going further into trial of the case, whereupon appeal was taken by plaintiff to the Supreme Court of Louisiana.

The character of the judgment brought up on writ of error in this case is best learned from the language of the opinion in accordance with which the decree is pronounced, *ipsissimis verbis—res judicata*. In respect to insignificant

spaces of land covered by water, if any there be, the reservation is expressed or made that the plaintiff may be permitted to amend within a time to be ordered by the lower Court, but is allowed no election or option against the effect of the decree as a whole, but is deprived of its title and possession and ownership of the property as a whole without a hearing or trial upon the merits of its case in the inferior court, the Civil District Court, or in the Supreme Court of Louisiana.

This view of the case appears to be the construction put upon the decision and opinion rendered by Mr. Justice Monroe both by the Chief Justice of the Supreme Court of Louisiana in granting the writ of error and by Associate Justice Provosty in dissenting from the decision and entering his dissent after a rehearing had been applied for by plaintiff, which was refused. As to the dissenting opinion, Provosty, J., the case had probably fallen to his charge for re-examination on rehearing. The obligation of contracts held by plaintiff is impaired by the Court's construction of the acts under which defendant in error is operating. The rehearing having been refused, the plaintiff is deprived of its rights and property without trial or due process of law. No alternative is left the plaintiff to save its property except to apply for a writ of error, which the Chief Justice allowed as properly lying in a case of this kind. The judgment is not one simply reversing and remanding the case, but deciding the case against the plaintiff on the merits of the controversy, and the plaintiff in error has elected to take this writ of error to the judgment of the Court, being the highest State court in which the controversy could be decided.

The opinion of the Court, through Monroe, Justice, literally sustains the demurrer or exception of no cause of

action, affirming the judgment of the lower Court as practically the final disposition of the case, and cuts out every vestige of plaintiff's rights and title to the land on the face of its patents, but offers plaintiff the alternative of enforced election to abandon its rights and property in accordance with the views of the opinion as *res judicata*, and by amendment of its petition make claim to insignificant spaces, if such land there be, subject to overflow or covered by water, under peril that the opinion be left as *res judicata* at every point unless this order and substantial renunciation be complied with within a delay to be fixed by the lower Court.

In the case of *Keystone Iron Co. vs. Martin*, 132 U. S. 91, the authorities pro and con on the subject of finality of judgments are reviewed and discussed. The doctrine of finality of the judgment is too familiar as the rule required by the act of Congress to require citation of authorities. But it is a finality of substance, not of form or technicality, which must be considered. The finality in question depends originally in all cases on the particular character or construction of the judgment in question as to its effect in divesting the plaintiff in error of its right to possession or ownership of property. This is the practice in the courts of Louisiana and this court, as well as courts of other States.

> "Whatever may be the character of the judgment in this case, it is clear that it is not a purely interlocutory judgment. It passes upon rights and decides questions of great importance to the parties. * * * Its decretal portion is premonitory of the ultimate decree or judgment in the case. If unappealed from, not being revisable by the Court by which it was rendered, it would have acquired the force of *res judicata* by the lapse of time, and so concluded the parties. It exhausts, so far, the powers of the Court, and is ap-

pealable, that its correctness may be tested. The defendant was left no other alternative but to appeal or acquiesce."

Cary vs. Richardson, 35 An. 508.

"An interlocutory judgment should not trench upon the merits of the cause; but the moment that it does it acquires a character of finality which assimilates it to a final judgment and renders it appealable. It is not essential for a judgment to be final that it should settle *all* [Court's italics] the rights existing between the parties to the suit. All that is required is that it determine issues involved on the merits of the action. The judgment is none the less final because some future orders of the Court may become necessary to carry it into effect. The nature of such an order depends upon the effect produced by the adjudication upon the rights and interests of parties. The stage at which it is made is not the test for appellate purposes. If an interlocutory order will finally affect the merits of the case or deprive a party of any benefit which he may have at the final hearing, an appeal is allowable. It is not always absolutely required to dispose of the entire merits of a cause and all the parties before the Court as a necessity to a final decree. Any order or decree finally setling any right or interest in controversy between the parties to a cause is final and reviewable."

Cary vs. Richardson, 35 An. 506, 507, and authorities cited; Code of Practice of Louisiana, Arts. 566, 567; *Hunstock vs. Hunstock*, 43 An. 375.

Also, in the case of *State ex rel. Ikerd vs. Judge*, 35 An. 213:

"It is a judgment which has a character of finality, as it severs and dismisses from the action part of the demand." * * *

" * * * Injury, if any is thereby occasioned, will have to be sustained by the defendants, who excepted in the manner they did, and who obtained the judgment complained of."

Ib., 35 An. 213.

"They might have avoided such judgment, by either asking and obtaining that their exceptions be tried at the same time as the merits or by objecting to evidence at the trial. They have elected their proceeding and must abide the consequences of that choice.

"The theory that a judgment is an entirety and indivisible can receive no application where distinct judgments are rendered at different times and on different subjects. In a proper case an appeal lies from each judgment so rendered."

State ex rel. Ikerd vs. Judge, 35 An. 213.

"The opinion of the State Court that the judgment which it affirms is final will be followed."

Rose's Code Federal Procedure, Vol. 1, Sec. 38, p. 210, and notes.

"The judgment appears to have been considered by that Court as so far final as to justify an appeal from it; and, if the Supreme Court of a State holds a judgment of an inferior Court of the State to be final, we can hardly consider it in any other light in exercising our appellate jurisdiction. The motion to dismiss must, therefore, be denied."

Belmont Bridge Co. vs. Wheeling Bridge Co., 138 U. S. 290.

"And, in general, if, by any direction of the highest State Court, the entire cause is determined, the de-

cision, when reduced to form and entered, constitutes a final reviewable judgment."

Rose's Code Federal Procedure, p. 210, Sec. 38; *Commissioners vs. Lucas*, 93 U. S. 113.

Chief Justice Taney in *Forgay vs. Conrad*, 6 How. 204; *Winthrop Iron Co. vs. Meeker*, 109 U. S. 180; *Union Mut. Ins. Co. vs. Kirchoff*, 160 U. S. 378, citing *Lodge vs. Twell*, 135 U. S. 232; *McGourkey vs. Toledo & Ohio R. R. Co.*, 146 U. S. 545, where cases are reviewed.

A condition in the cases is that another judgment could be rendered on another appeal. This is not the case here, that "the cause may yet be finally determined in favor of the plaintiff in the State court."

Marshall, C. J., *Houston vs. Moore*, 3 Wheat. 433; *Davis vs. Crouch*, 94 U. S. 517.

The amendment ordered is a misnomer. We are not awarded a *venire facias de novo*. We are ordered to accept the decree as final on pain of dismissal. The judgment is not left open, but is pronounced *res judicata* on pain of dismissal if decree and amendment be not accepted.

There was an injunction in our case and a motion to dissolve, in which the defendant set up all its defenses and went to trial, and testimony was taken and evidence of surveys, maps, charts, etc., introduced.

In *Commissioners, etc., vs. Lucas, Treasurer*, 93 U. S. 113, Mr. Justice Field, delivering the opinion of the Court, said:

"It is objected, *in limine*, that this Court has no jurisdiction of the cause, on the alleged ground that the judgment rendered is not a final judgment. But the direction to that Court * * * made a final disposition of the cause. With the entry of that judgment the case was at an end. With the peculiarities of the

practice of the Indiana Courts we have nothing to do. If, upon an appeal from an interlocutory order, a final disposition of the merits of a cause can be made in that State, it is no concern of ours. If, by any direction, the entire cause is in fact determined, the decision, when reduced to form and entered in the records of the Court, constitutes a final judgment, subject in a proper case to our review whatever may be its technical designation.

"The course adopted in this case was evidently pursued from the fact that the whole merits of the controversy had been considered on the motion for preliminary injunction.

"The application was founded upon the alleged validity of the Act of 1872; no other matter was discussed, and all objections in the form of proceedings were waived that the validity of the act might be considered and determined. Being determined against the view advanced by plaintiffs, the cause, so far as the State Courts were concerned, was practically at an end.

"In this court the validity of the act of 1872 is the sole question presented. The act is assailed here, as in the court below, as authorizing an invasion of the right of private property and as impairing the obligation of an executed contract."

93 U. S. 113.

No answers were filed, although the case was three times up for trial; but it is understood and disclosed by the motions to dissolve that the defendant Oyster Commission and the other defendants, licensees, claim exclusive right to take oysters in the shell or otherwise wherever found in a natural state, and, if any private ownership of oysters or "oyster properties, if there be such, which appearer denies" (motions to dissolve and dismiss, p. 3), exists, which the defend-

ants deny, the oysters, wherever found, are subject to their exclusive pursuit, control and possession under penalties of criminal offense against plaintiff under the said Oyster Commission Act. This denial or joinder of issue is extended and set out in detail in the motions to dissolve the injunction filed severally by the defendants, but uniting for defense on the common issue. The motions to dissolve are substantially alike, so that the motion of the Oyster Commission is here reproduced as a sample for all, as follows:

> "Comes the Oyster Commission of Louisiana, one of the defendants in the above numbered and entitled cause, and shows to the Court that the order entered for the issuance of the injunction herein was improvidently granted.
>
> "It shows that the amount of bond fixed by said order and which was given by plaintiff, is totally inadequate to secure the damages which will accrue to appearer or appearer's codefendants herein.
>
> "It shows that it derives the following revenue from the oyster business and industry in the territory covered by plaintiff's injunction, and the canneries and shucking establishments which obtain their oysters from said territory—viz.: Privilege tax upon oysters, $8,681; canners' licenses, $300; shop licenses, $85; scrapers' licenses, $675; vessel licenses, $825; making a total of $10.567; all of which is collected during each oyster season, which begins about October 15th and ends about April 15th each year.
>
> "It shows that the effect of the injunction herein issued has been to practically paralyze the oyster industry in the said territory, and to prevent appearer from collecting the revenues set out above.
>
> "It shows that, before this cause can be finally heard and determined, the oyster season will be over and the above amount of revenue will be entirely lost to this appearer, and that it will be damaged thereby in that amount.

"It shows that said injunction prevents this appearer from collecting the tax of three cents per barrel imposed by law upon all oysters fished in Louisiana waters, whether fished from natural reefs or from private bedding-grounds or privately-owned oyster properties, if there be such, which this appearer denies.

"It shows that said injunction prevents appearer from enforcing the criminal laws of the State of Louisiana in reference to the oyster waters and industry, and from causing the arrest, prosecution, conviction and punishment of those who may break said laws in the territory covered by the injunction herein issued (which it is its duty to do) if said persons should happen to be in the employ of plaintiff, or if the vessels breaking such laws should be owned, chartered or operated by said plaintiff or anybody in its employ.

"It shows that said writ of injunction is an attempt to prevent the enforcement of the criminal statutes of the State of Louisiana by the department of the State Government upon which, by law, devolves the enforcement of said statutes, by means of an injunction from a Court of purely civil jurisdiction.

"It shows that the allegations of the petition and the terms of the injunction herein issued are too vague and indefinite as to the property with which appearer is enjoined from interfering to enable appearer, its agents, officers and employees, to know what land is meant, or with what property they are enjoined from interfering, or granting leases on. It shows that the places known as 'Creole Gap' and 'Grand Pass' (the only places mentioned in the writ of injunction served upon it) are bodies of water, and not land, being a part of the Gulf of Mexico, connecting said gulf with the body of water known as 'Mississippi Sound,' both of which bodies of water are a part of the high seas and not subject to private ownership, and which to said named passes or gaps are navigable channels connect-

ing said gulf and sound, and which are not susceptible of private ownership.

"It shows that the waters of Creole Gap and Grand Pass contain natural oyster reefs, where oysters grow naturally, and that same are, and have been for many years, reserved by law for public use, and are reserved from private ownership, and that appearer is charged with the custody and management of same by the laws of Louisiana.

"It shows that none of the titles of petitioner cover anything except land, same being for certain fractional sections of land, and that the surveys and maps thereof made by the United States Government were adopted by the State of Louisiana, and that all titles by the State of Louisiana to all lands in that region are made according to such surveys and maps and only to lands, specially exempting and reserving from said titles all waters, as shown by the area of the lands set forth in said titles and by the maps showing the water-line. That plaintiff has, therefore, no right to an injunction prohibiting appearer from in any manner managing and controlling the waters of the said territory and the oyster reefs and bottoms under said waters, same not being covered by any title held by plaintiff.

"Wherefore, appearer prays that this Court issue a rule, to the said Louisiana Navigation Company, Limited, directed, commanding it to appear in this court show cause why said injunction herein issued should on Friday, January 22, 1909, at 11 o'clock a. m., and not be dissolved and set aside, and, in the alternative, why said plaintiff should not be required to furnish bond herein in favor of this appearer in the sum of fifteen thousand, eight hundred and fifty-one dollars ($15,851), and, failing to furnish said bond, that said injunction be dissolved and set aside.

"Appearer further prays that upon the trial hereof this rule be made absolute, and said injunction be

dissolved and set aside, and, in the alternative, and only in the event that the foregoing prayer be refused and denied, that plaintiff be required to furnish bond in the amount and as set out above; and, failing to furnish same, that the injunction herein issued be dissolved and set aside.

"JNO. C. WICKLIFFE,

"Attorney Oyster Commission of Louisiana."

The action itself is finally disposed of, for we are only permitted to question it as *res judicata* as to insignificant spaces, if any there be, of which we have not any more conception than appears from the maps and surveys which can be looked at and were all in evidence.

We are not bound to amend to save our case as to any part, however insignificant, but are left the right to elect to take a writ of error to the judgment as a finality as a whole, for so it disposes of our rights.

If possession or ownership of property can be violently taken away from the party complainant, there is nothing left of his title but the record of his loss and misfortune of owning or coming lawfully into possession of something which might excite the envy of individuals actuated by a mistaken zeal or claiming unjustly to be representing or inspired by motives of protecting the State or public interests.

The fact that these considerations or consequences of the judgment are so pronounced in the present case affords strong argument for sustaining the writ of error to the State Court.

The judgment cut the ground from under plaintiff's feet. It had no election but to take a writ of error, particularly to the part of the decree that it should amend as proof of

the finality of the judgment at large, of which the amendment was a part most fatal and final.

We will here quote literally from the opinion or decision of Mr. Justice Monroe to illustrate our remarks, and it will be seen that the authorities and statement of the motion to dismiss have no bearing on a case of this kind:

> "The ground relied on presents the question whether the patents exhibited by the plaintiff now before the Court conveyed the property which plaintiff is seeking to protect, or whether that property is part of the public domain, the administration of which is vested in the Oyster Commission.
>
> "We conclude * * * that the grants under which plaintiff claims * * * in so far as it (plaintiff) asserts ownership and possession * * * of land lying beneath the waters which surround the tracts of dry land included in said grants, or * * * intersect such tracts or separate them from each other, the exception of no cause of action was properly maintained. It does not follow, however, that the petition, taken as a whole, fails to disclose a cause of action. Since its allegations are broad enough to import a charge of trespass with respect to the dry as well as the submerged land, * * * it cannot properly be said that it does not show a cause of action. Moreover, it seems not unlikely that there may be nonnavigable streams, pools, ponds and wet places so insignificant in dimensions and so within the borders of the dry land covered by plaintiff's grants as that plaintiff would be entitled to hold them as included therein, and yet with respect to which defendants may entertain a different opinion and may hereafter insist that the judgment appealed from constitutes *res judicata*."

The Court orders that the judgment appealed from be set aside and that the case be remanded to the District

Court, to be there proceeded with "in accordance with the views expressed in this opinion."

> "Provosty, J., dissents, and holds that the case ought to be tried on the merits, and the plaintiff be allowed all those parts which have been patented to the State by the United States Government, and by the State to plaintiff, as land."

The plaintiff in the lower court had already amended its petition as far as it was possible to amend or human knowledge of the country and land in question permitted it to go, as will be seen from the amended and supplemental petition in the record filed under the ruling of the Court of first instance on exception of vagueness previously filed. This amendment is quoted at length in the decision or opinion of the Court.

125 La. —, 51 So. Rep. 708.

The judgment of the Supreme Court denies plaintiff a trial of its case, and yet, passing upon the titles of plaintiff, concludes plaintiff, by declaring its views as expressed in the opinion *res judicata* of the patents and plaintiff's rights and all questions involved, denying any further proceedings except as to "spaces so insignificant in dimensions," if any there be, as to which plaintiff has no knowledge or conception other than as shown by the Government survey of the land as a whole as alleged; and the Court's opinion manifests its indisposition to learn by pronouncing its views *res judicata* upon the case and closing the door to all further proceedings as to the whole body of the land embraced in plaintiff's titles or patents. Even as to "spaces insignificant in dimensions," if any there be, the enforced doctrines of its final judgment, in accordance with the views contained

in its opinion, apply with equal weight as *res judicata* of the whole subject at issue. The plaintiff in error has literally never had a trial upon the merits. The opinion of Provosty, Justice, is terse and pertinent to the point that the judgment is final, and further or subsequent proceedings interest plaintiff no more:

> "Provosty, J., dissents, and holds that the case ought to be tried on the merits, and the plaintiff be allowed all those parts which have been patented to the State, by the United States Government, and by the State to plaintiff, as land."

The Chief Justice, by his action and order granting the writ of error, has thought it a proper case for removal to this Court by writ of error.

In a case of evident finality of the judgment, and where the Federal question is broadly and particularly raised and passed upon adversely to plaintiff, and the public interest, if any, is in no way prejudiced or involved, this Court would not sustain a motion to dismiss on grounds that the judgment complained of is not a final judgment and the Federal question not involved; or, if arising, involved to an extent so frivolous as to evidence the writ was obtained only for purposes of delay till the present term of this Court. The rights of plaintiff and its titles, patents and vested interests taken away, sacrificed and utterly and finally destroyed by the decision, if permitted to stand, could not be helped by delay, nor would intelligent counsel hold this Court in so little esteem as to resort to practice to obtain a writ of error for dilatory effect or purpose. The condition of affairs with plaintiff in the unjust destruction of all its interests and investment is too serious to be considered in the light vein indulged in by counsel whose official position

evidences their lack of concern for, or removal from care of, an actual interest or sacrifice of ownership of others. Interests partaking of a public character or nature are not necessarily prejudiced at any time.

The Supreme Court of the United States has very recently held that a State Court cannot by a change in its common law deprive persons of the enjoyment of something that had theretofore been considered property or a necessary incident thereto.

> *Muhlker vs. Harlem Railroad Co.* (1905), 197 U. S. 544.

In *Yates vs. Milwaukee*, 10 Wall. 497, the Supreme Court of the United States, through Mr. Justice Miller, said:

> "Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor, * * * subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be. * * * This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."
>
> 10 Wall. 497.

In *Town of Brookhaven vs. Smith*, 188 N. Y. 80, it was said:

> "The *jus privatum* of the Crown, by which the English King was deemed to own the soil of the sea and of navigable rivers in his own right rather than as sover-

eign holding it in trust for his people, however applicable to the conditions in Great Britain, was totally inapplicable to the situation of the colonists in this country. In Gould on Waters the author remarks as to this that 'there is no evidence that the *jus privatum* * * * was ever asserted in the colony as the right of the Crown or that it has, until recently, been claimed by the States'; but there is, on the contrary, in my opinion, the strongest evidence that this right has been abandoned to the proprietors of the land from the first settlement of the province, and exercised by them to the present day, so as to have become a common right, and thus the common law."

Town of Brookhaven vs. Smith, 188 N. Y. 80; *Huntington vs. Lowndes*, 153 U. S. 1-34; *Barnes vs. Midland Railroad Terminal Co.*, 85 N. E. 1093 (40 N. Y. L. J. 927); *Blundell vs. Catteral*, 5 B. & Ald. 268.

We submit that the motion to dismiss of the defendant in error should be denied.

Respectfully submitted,

J. C. GILMORE,
THOMAS GILMORE,
EDWARD N. PUGH,

Attorneys for Louisiana Navigation Company, Limited, Plaintiff in Error.

No. ~~201~~ [redacted]

JUL 12 19[redacted]
JAMES H. McKEN[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 22,123.

LOUISIANA NAVIGATION COMPANY, LIMITED,
PLAINTIFF IN ERROR,

AGAINST

OYSTER COMMISSION OF LOUISIANA ET ALIOS,
DEFENDANTS IN ERROR.

MOTION TO DISMISS OR AFFIRM, AND COPY OF NOTICE TO OPPOSING COUNSEL.

WALTER GUION,
Attorney-General.
JNO. C. WICKLIFFE,
Attorney Oyster Commission of Louisiana.

J. G. HAUSER, "The Legal Printer," 620-622 Poydras Street, N. O.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 22,123.

LOUISIANA NAVIGATION COMPANY, LIMITED,

PLAINTIFF IN ERROR,

AGAINST

OYSTER COMMISSION OF LOUISIANA ET ALIOS,

DEFENDANTS IN ERROR.

Comes now the defendant in error, by its counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for want of jurisdiction, because:

FIRST. The judgment, or decree, from which the writ of error purports to have been taken, is the judgment, or decree, of the Supreme Court of one of the United States—to wit, the Supreme Court of the State of Louisiana.

SECOND. The judgment, or decree, from which the writ of error purports to have been taken, is not a final judg

ment in this cause, said judgment, or decree, remanding said cause to the inferior Court for an amendment of the pleadings, and a new trial under the pleadings as thus amended.

THIRD. The judgment, or decree, from which the writ of error purports to have been taken, decides no Federal question, but merely a question of practice under the Code of Practice of the State of Louisiana, applicable to the trial of civil cases.

And the said defendant in error, by counsel as aforesaid, also moves the Court to affirm the said judgment, or decree, from which said writ of error purports to have been taken, because, although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said writ of error was sued out for delay only.

WALTER GUION,
Attorney-General;

JNO. C. WICKLIFFE,
Attorney Oyster Commission of Louisiana,
Counsel for Defendant in Error for the
Purposes of This Motion.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 22,123.

LOUISIANA NAVIGATION COMPANY, LIMITED,

PLAINTIFF IN ERROR,

AGAINST

OYSTER COMMISSION OF LOUISIANA ET ALIOS,

DEFENDANTS IN ERROR.

TO MESSRS. J. C. GILMORE AND E. N. PUGH,

Counsel for Plaintiff in Error:

Please take notice that, on Monday, the tenth day of October, 1910, at the opening of court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

(Signed) WALTER GUION,
Attorney-General;

JNO. C. WICKLIFFE,
Attorney Oyster Commission of Louisiana,
Counsel for the Defendant in Error for
the Purposes of This Motion.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

Before me, the undersigned authority, this day personally came and appeared Jno. C. Wickliffe, Esquire, attorney for the Oyster Commission of Louisiana, who, being by me first duly sworn, deposes and says that, on this day, he deposited in the post-office of the United States in the City of New Orleans a copy of the foregoing notice, with copies of the motion to dismiss or affirm, and of the brief of argument therein referred to and hereto attached, addressed to the counsel named therein.

JNO. C. WICKLIFFE.

Signed and sworn to before me
this 1st day of July, 1910.

CONRAD G. COLLINS,
Not. Pub.

No. [redacted]

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JAMES H. McKE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 22,123.

LOUISIANA NAVIGATION COMPANY, LIMITED,
PLAINTIFF IN ERROR,

AGAINST

OYSTER COMMISSION OF LOUISIANA ET ALIOS,
DEFENDANTS IN ERROR.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION BY DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

WALTER GUION,
Attorney-General.
JNO. C. WICKLIFFE,
Attorney Oyster Commission of Louisiana.

J. G. HAUSER, "The Legal Printer," 620-622 Poydras Street, N. O.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

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LOUISIANA NAVIGATION COMPANY, LIMITED,

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AGAINST

OYSTER COMMISSION OF LOUISIANA ET ALIOS,

DEFENDANTS IN ERROR.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION BY DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

May It Please the Court:

The judgment of the Supreme Court of the State of Louisiana, from which this writ of error has been taken, is not final, is in favor of the party who sued out the writ of error, gives that party all the relief it prayed in its appeal; and condemns the appellees in the appeal

to the Supreme Court of Louisiana, the defendants in the writ of error in this matter, to pay the costs of the appeal.

The Louisiana Navigation Company, the plaintiff in the suit in the court of the first instance, the appellant in the Supreme Court of Louisiana, and the plaintiff in error in this court, filed its petition against the Oyster Commission of Louisiana and other parties, making them defendants in an injunction and damage suit, alleging trespass in the past, asking damages for that trespass, praying an injunction against future trespass, and demanding an accounting for certain property belonging to it alleged to have been taken by certain of the defendants.

To this petition the defendants in the lower court, the defendants in error in this court, filed an exception of no cause of action. This exception was, after due trial, sustained by the Court of the first instance, and the suit of the Louisiana Navigation Company dismissed. From that judgment the Louisiana Navigation Company appealed to the Supreme Court of Louisiana. On the hearing of that appeal the Supreme Court of Louisiana reversed the judgment appealed from, remanded the case to the Court which had tried it originally, with orders to have the petition amended within a delay to be fixed by the trial Court, and to retry the case on the pleadings as thus amended, and ordering the Oyster Commission of Louisiana and its co-defendants, the defendants in the writ of error herein sued out, to pay the costs of the appeal. In

other words, the plaintiff in error obtained from the Supreme Court of Louisiana all the relief which it prayed for from that Court.

Instead of going back to the trial Court, making the amendment ordered by the judgment which it had provoked from the Supreme Court of Louisiana, and retrying the case on the amended pleadings, and prosecuting its case to a final judgment in the State courts of Louisiana, it has sued out this writ of error.

We submit that the writ of error does not lie in a case of this character; that is, in a case where the record shows the condition of affairs shown by this record. The writ of error can be invoked only as a last resort, when there are no further proceedings which can be taken by the complainant in the State courts. And in support of this proposition we submit the following authorities:

> "A judgment which orders a new trial, or any further proceedings, cannot be thus reviewed."
>
> *Houston vs. Moore*, 3 Wheat. 433; *Parcels vs. Johnson*, 20 Wall. 653; *Rankin vs. State*, 11 Wall. 380; *McComb vs. Comrs. Knox Co.*, 91 U. S. 1; *Bostwick vs. Brinkerhoff*, 106 U. S. 3; *Gibbons vs. Ogden*, 6 Wheat. 448; *Meagher vs. Minn. Thr. Mfg. Co.*, 145 U. S. 608; *Street Ry. Co. vs. Snell*, 17. U. S. 395.

> "A writ of error will not issue to a judgment of the highest Court of a State remanding a suit to an inferior Court for a new trial, or for other proceedings in equity."
>
> *Johnson vs. Keith*, 147 U. S. 130; *Winn vs. Jackson*, 12 Wheat. 135; *Mayberry vs. Thompson*,

5 How. 121; *Holcome vs. McCusick*, 20 How. 352; *Zeller vs. Switzer*, 91 U. S. 487; *Baker vs. White*, 92 U. S. 176; *Davis vs. Cranch*, 94 U. S. 514; *Smith vs. Adams*, 146 U. S. 619; *Union Mut. Ins. Co. vs. Kirchoff*, 160 U. S. 374.

"A decree which in part sustained and in part overruled a demurrer, but which did not dismiss the petition, was held not final, and not reviewable on appeal."

G. W. Tel. Co. vs. Burnham, 162 U. S. 339; *De Arnas vs. U. S.*, 6 How. 163.

"Where a State statute permits the amendment of a pleading after a demurrer has been sustained, it was held that a judgment of a State Court sustaining a demurrer to a petition was not a final judgment until it appeared that the plaintiff's right to amend had been abandoned or taken away."

Clark vs. Kansas City, 176 U. S. 114; *Same vs. Same*, 172 U. S. 334.

That the plaintiff in error had the right under the statute of Louisiana to amend its petition is shown by the judgment of the Supreme Court of Louisiana against which the writ of error in this cause is leveled. That judgment directed the Judge of the court of the first instance to cause the amendment to be made, and we submit that this Court can legitimately infer that the Supreme Court of the State of Louisiana would not order a thing to be done unless the law of Louisiana allowed it to be done.

Plaintiff in error has not exhausted its remedies in the courts of Louisiana, and we submit that, under the authorities quoted above, until it has done so, its resort to this Court is premature.

On the alternative motion to affirm, we submit that, with the overwhelming weight of authorities quoted above to the effect that plaintiff in error was not entitled, at the present time, to the writ it has sued out, a resort to that writ, knowing that no relief could be had under it, could only have been for delay. The only alternative to this supposition is that the learned counsel for plaintiff in error were not familiar with the jurisprudence of this Court on this question, and did not know of the decisions quoted above. The character and standing of counsel forbid any such supposition, and we are, therefore, forced to the conclusion that a delay until the next term of this Court wast he purpose of this writ. We know that delay is all that plaintiff in error can obtain by the application for this writ, and we invoke the presumption of law that every person is presumed to know the consequences of his own acts, and to intend to produce those consequences when he performed such acts.

Respectfully submitted,

WALTER GUION,
Attorney-General.

JNO. C. WICKLIFFE,
Attorney Oyster Commission of Louisiana.

OCT 28 1912

No. 40.

Supreme Court of the United States

OCTOBER TERM, 1912.

LOUISIANA NAVIGATION COMPANY, LIMITED,
PLAINTIFF IN ERROR,
VERSUS
OYSTER COMMISSION OF LOUISIANA, E. C. JOULLIAN CANNING COMPANY, AND DUNBARS, LOPEZ & DUKATE COMPANY,
DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF OF THE CONSERVATION COMMISSION OF LOUISIANA, DEFENDANT IN ERROR.

RUFFIN G. PLEASANT,
Attorney General of Louisiana,
For Conservation Commission of Louisiana.

THE L. GRAHAM COMPANY, PRINTERS.

No. 40.

Supreme Court of the United States

OCTOBER TERM, 1912.

LOUISIANA NAVIGATION COMPANY, LIMITED,

PLAINTIFF IN ERROR.

VERSUS

OYSTER COMMISSION OF LOUISIANA, E. C. JOULLIAN CANNING COMPANY, AND DUNBARS, LOPEZ & DUKATE COMPANY,

DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF OF THE CONSERVATION COMMISSION OF LOUISIANA, DEFENDANT IN ERROR.

SYLLABUS.

The judgment of the Supreme Court of Louisiana, sought to be reviewed herein, is not a final judgment. The defendants in the Civil District Court filed exceptions of no cause of action, which were sustained, and an appeal was taken to the Supreme Court of Louisiana, and that Court, on appeal, reversed the judgment, and decreed "that the judgment appealed from be set

aside, and that this cause be remanded to the District Court, to be there proceeded with in accordance with the views expressed in this opinion, the costs of appeal to be paid by defendant and those of the District Court to await the *final judgment*." Hence, this Court will not review the judgment of the Supreme Court of Louisiana under these conditions. *Hasteline vs. Central Bank of Springfield, No. 1*, 183 U. S. 130;

Schlosser vs. Hemphill, 198 U. S. 173; *Missouri & Kansas Interurban Ry. vs. City of Olathe*, 222 U. S. 185, in which latter case it is said:

"Where the judgment sought to be reviewed affirms the judgment below, but merely sustains the demurrer without dismissing the suit, so that the cause is left standing in the lower court for further proceedings, it is not a final judgment reviewable by this Court."

In a case coming from a State court, this Court can consider only Federal cases decided adversely to the plaintiff in error, and upon which a decision was necessary to the decision of the case, and if the judgment complained of is supported upon other and independent grounds it must be affirmed or the writ dismissed.

Beaupre vs. Noyes, 138 U. S. 397; *Harrison vs. Morton*, 171 U. S. 38; *Leathe vs. Thomas*, 207 U. S. 93; *Capital Bank vs. Cadiz Bank*, 172 U. S. 425.

The Supreme Court of Louisiana held that the titles of plaintiff in error did not carry ownership beyond high water mark.

Louisiana Navigation Company vs. Oyster Commission of Louisiana, 125 La. 740, 755.

This is in harmony with the settled law of Louisiana.

Civil Code of Louisiana, Art. 453; *Milne vs. Girodeau*, 12 La. 325; *Zeller vs. Yacht Club*, 34 La. An. 837; 13 La. An. 130.

The decision of the Supreme Court of Louisiana on this point is conclusive on this Court.

Illinois Central R. R. Co. vs. Chicago, 176 U. S., at page 659.

It depends upon the law of each State to what extent the prerogative of the State to lands under water shall extend, and this Court will accept the local law as governing.

Hardin vs. Jordan, 140 U. S. 371, 382; *Barney vs. Keokuk*, 94 U. S. 324; *Packer vs. Bird*, 137 U. S. 661; *Mobile Transportation Co. vs. Mobile*, 187 U. S. 487.

The declared policy of the State of Louisiana has always been against alienating soil lying beneath her navigable streams.

State vs. Bayou Johnson Oyster Co., decided March 11, 1912, by the Supreme Court of Louisiana (rehearing refused April 22, 1912), not yet reported.

"Whether a grant of the United States to land lying on a navigable stream, within the limits of the State, extends to high or low water mark, or to the middle thread of the stream, is not a Federal, but a local question." *Webb vs. Demopolis*, 95 Ala. 116, citing *Barney vs. Keokuk*, 94 U. S. 324, and other cases.

Lowndes vs. Huntington, 152 U. S. 30; *Burgess vs. Seligman*, 107 U. S. 20, 33.

If the judgment of the State court gives no effect to the subsequent law of the State, and the State court decides the case upon grounds independent of that law, a case is not made for review upon any ground of the impairment of a contract.

Bacon vs. Texas, 163 U. S. 207; *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 U. S. 18; *Kreiger vs. Shelby R. Co.*, 125 U. S. 39.

The case is not altered by the fact that the State has passed an act which the defendants assert impairs the obligation of their contract, so long as the Court, in deciding their case, holds that they never had a contract, and so long as it gives judgment wholly and solely without reference to the subsequent act, and without holding or in any manner giving effect to any provision thereof.

Bacon vs. Texas, 163 U. S. 207.

STATEMENT OF THE CASE.

This action was begun in the Civil District Court for the Parish of Orleans by the plaintiff in error, the Louisiana Navigation Company, against the Oyster Commission of Louisiana, the E. C. Joullian Canning Company, and Dunbar, Dukate & Lopez, the two latter corporations being organized under the laws of the State of Louisiana, and the Oyster Commission of Louisiana being a State agency, which, at the time of the filing of this suit, had charge of the State's oyster bottoms. The plaintiff therein sought to recover of the said defendants the sum of $6,000 alleged to have been sustained by it in damages as the result of their alleged taking of oysters from certain water bottoms claimed to belong to plaintiff, and for depredations said to have been committed on its alleged water bottoms, and for injunction to prevent defendants interfering with plaintiff's possession.

It may be well here to state, in this connection, that the Oyster Commission of Louisiana no longer exists, having been succeeded and absorbed by the Board of Commissioners for the Protection of Birds, Game and Fish, a corporation and State agency, which in turn has been absorbed by the Conservation Commission of Louisiana, created by the provisions of Act No. 127 of 1912, likewise a State agency, and which Commission now has taken over, and has charge of, the State's oyster bottoms and the leasing of same to individuals in the manner therein set out, and it is in this connection that the Attorney General, who is now made by law the legal adviser and attorney of the Conservation Commission, appears herein.

The petition filed by the plaintiff in the Civil District Court is quite lengthy, but is also quite indefinite—so much

so that the defendants therein, in addition to filing exceptions of no cause of action, also filed exceptions of vagueness and indefiniteness, in that plaintiff had not set out its titles with sufficient clearness to enable defendants to answer. The Civil District Court, believing the exceptions as to vagueness well founded, sustained the exceptions of defendants in that respect, and ordered the plaintiff to amend its petition so as to set forth more clearly the description of the property which it claimed. To this ruling the plaintiff acquiesced, and filed a supplemental petition, more specifically describing the property, and annexed maps and diagrams in support of its alleged ownership of the water bottoms claimed by it. On the filing of this supplemental petition the defendants again excepted, on the ground that the said petition and supplemental petition and documents annexed thereto disclosed no cause of action, and these exceptions of no cause of action were, thereupon, sustained, and the plaintiff's suit dismissed.

From this judgment the plaintiff appealed to the Supreme Court of Louisiana, and that Court rendered a decree reversing and setting aside the judgment of the Civil District Court, and remanded the case to the Civil District Court (to quote from the judgment), "to be there proceeded with in accordance with the views expressed in this opinion, the costs of the appeal to be paid by defendants, and those of the District Court to await the final judgment." 125 La. Reports, 744-755 (Record, p. 60).

It is from this judgment, so rendered by the Supreme Court of Louisiana, that this Honorable Court is asked to review what the plaintiffs are pleased to term "a final judgment" of the Supreme Court of Louisiana.

BRIEF.

In order correctly to understand the judgment and decree rendered by the Supreme Court of Louisiana, reversing and remanding the judgment of the lower Court, we think it well to quote the concluding part of the opinion, which will throw some light on the decree. It is as follows:

> "We conclude, then, that the grants under which plaintiff claims—being of land bordering upon, and partially surrounded by, the tide water of the Gulf of Mexico—carry its titles no farther than high-water mark, and that, in so far as it (plaintiff) asserts ownership and possession, under such titles, of land, lying beneath the waters which surround the tracts of dry land included in said grants, or lying beneath any navigable passes, or channels, which intersect such tracts or separate them from each other, the exception of no cause of action was properly maintained.
>
> "It does not follow, however, that the petition, taken as a whole, fails to disclose a cause of action, since its allegations are broad enough to import a charge of trespass with respect to the dry, as well as the submerged, land, and though the charge is not as specific as the defendants have a right to require and the trial Judge to order, it cannot properly be said that it does not show a cause of action. Moreover, it seems not unlikely that there may be non-navigable streams, pools, ponds, and wet places, so insignificant in dimensions and so within the borders of the dry land covered by plantiff's grants as that plaintiff would be entitled to hold them, as included therein (See *Burns vs. Crescent, etc., Club*, 116 La. 1038), and yet, with respect to which, defendants may entertain a different opinion and may hereafter insist that the judgment appealed from constitutes *res judicata*.
>
> "We think, therefore, that plaintiff should be agian afforded an opportunity to amend its petition (within

a delay to be fixed by the Judge *a quo*) by setting forth, specifically, the particular places, or portions of its property, upon which the alleged trespass has been committed, together with the time and manner of the trespass. As the case is presented, the location of Creole Pass is a matter of guesswork, *and we are not informed, even by the allegation, whether either of the passes mentioned in the petition is navigable or otherwise.*"

And then follows the judgment quoted heretofore, which reversed the judgment appealed from and remanded the case to the District Court, to be there proceeded with in accordance with the law.

The above-quoted excerpt from the opinion will show that this is not a final judgment, and that the case is, therefore, not reviewable by this Court. In *Husteline vs. Central Bank of Springfield*, 183 U. S., at page 131, which is a case similar to the one now before it, this Court said: said:

"The motion to dismiss must be granted. We have frequently held that a judgment reversing that of the Court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. The case of *Mower vs. Fletcher*, 114 U. S. 127, is not in point, as the judgment of the Supreme Court of the State remanded that case to the inferior court with an order to enter a specified judgment, nothing being left to the judicial discretion of the Court below.

* * * * * * *

"While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleadings by supplying some discovered defect, and

go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the Supreme Court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case."

This case is cited with approval in *Schlosser vs. Hemphill*, 198 U. S., page 175, where the Court says:

"By its judgment the Supreme Court of Iowa reversed the decree of the trial Court and remanded the cause 'for further proceedings in harmony with the opinion of this Court.'

"We have heretofore held that a judgment couched in such terms is not final in such a sense as to sustain a writ of error from this Court. *Hasteline vs. Bank*, 183 U. S. 130. It was there ruled that the face of the judgment is the test of its finality, and that this Court cannot be called on to inquire whether, when a cause is sent back, the defeated party might or might not make a better case."

And in *Missouri & Kansas Railway Co. vs. City of Olathe*, 222 U. S., page 184, the doctrine announced in the foregoing cases is embraced in the syllabus to the case, as follows:

"Unless it appears from the record that the judgment sought to be reviewed finally determines the cause, this Court is without jurisdiction.

"Where the judgment sought to be reviewed affirms

> the judgment below, but merely sustains the demurrer without dismissing the suit, so that the cause is left standing in the lower court for further proceedings, it is not a final judgment reviewable by this Court."

We therefore respectfully submit that this Court should not review this case, in view of the judgment disclosed by the record.

No Federal Question Involved.

While the plaintiff in error has set up in its pleadings the impairment of contract obligations and the divestiture of rights, privileges and immunities, under the Constitution of the United States and the Constitution of the State of Louisiana, although the same are by no means pleaded specifically, so as to be cognizable by this Honorable Court, it is evident that the same are frivolous and without foundation in law or fact. The plaintiff specifically set up its ownership of the property described by it, and sued to recover damages for trespass thereon committed by defendants. When called upon to produce its titles to the property, it set out at length, in its supplemental petition, the boundaries thereof, and annexed thereto certain maps, etc., in support of its claim of certain water bottoms, upon which the trespass was alleged to have been committed. But the Civil District Court and the Supreme Court of Louisiana found, as a matter of fact and law, that the water bottoms alleged to belong to plaintiff in error did not, and never did, belong to it, the Court holding: "There can be no such thing in this State as private ownership of the bed of a navigable river, and *a fortiori*, can there be no such thing as private ownership of the bed of the sea, or of an arm of the sea," citing, in support of said opinion,

the provisions of Article 453 of the Civil Code of Louisiana, which provides:

> "Public things are those the property of which is vested in the whole nation, and the use of which is allowed to all members of the nation; of this kind are navigable rivers * * * and the beds of rivers, so long as the same are covered with water,"

as also *Boyken vs. Shaffer*, 13 An. 130; *Milne vs. Girodeau*, 12 La. 325; *Zeller vs. Yacht Club*, 34 An. 837; *McDade vs. Bossier Levee Board*, 109 La. 625; *Hall vs. Board, etc.*, 111 La. 913, and other authorities cited by the Supreme Court of Louisiana, at record, page 57, from the reports of this Court.

The Supreme Court of Louisiana having thus decided, this Court will not interfere with its ruling, for it is well settled that in determining what, if any, riparian rights exist in favor of the owners of the land bounded on streams or other waters, the title and rights of riparian proprietors in the soil below the high-water mark are governed by the laws of the several States, subject to the rights granted by the Constitution to regulate commerce. To this effect is *I. C. Railroad vs. Chicago*, 176 U. S. 659; *Barney vs. Keokuk*, 94 U. S. 324, and *Hardin vs. Jordan*, 140 U. S. 382, in which latter case this Court said:

> "With regard to grants of the Government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties

thereto and held in trust for the public purposes of navigation and fisheries—and cannot be retained or granted out to individuals by the United States. *Pollard vs. Hagan*, 3 How. 212; *Goodtitle vs. Kibbe*, 9 How. 471; *Weber vs. Harbor Commissioners*, 18 Wall. 57. Such title being in the State, the lands are subject to State regulation and control, under the conditions, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. * * * .

"This right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown of England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

Continuing, the Court said:

"In the case of *Barney vs. Keokuk*, 94 U. S. 324, we held that it is for the several States themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections. That was a case which arose in the State of Iowa with regard to land on the banks of the Mississippi, in the City of Keokuk, and it appearing to be the settled law of that State that

> the title of riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low-water mark, as well as the bed of the river, belongs to the State, this Court accepted the local law as that which was to govern the case. The same view was taken in quite a recent case with regard to titles on the Sacramento River under the law of California. *Packer vs. Bird*, 137 U. S. 661."

Hence, we say that there is nothing in the record which involves a Federal question, but a question of local law solely, the decision of which, by the State court, will not be interfered with by this Court.

> *Webb vs. Demopolis*, 95 Ala. 116, citing *Barney vs. Keokuk*, 94 U. S. 324; *Packer vs. Bird*, 137 U. S. 661, above cited.

In fact, it has been held that it was a "question of local law, with regard to which the decisions of the State Courts are conclusive."

> *I. C. Railroad vs. Chicago*, 176 U. S. 659; *Loundes vs. Huntington*, 153 U. S. 19 and 30; *Burgess vs. Seligman*, 107 U. S. 20, 32; *Mobile Transp. Co. vs. Mobile*, 187 U. S. 487.

There is no reason why the doctrine announced in the above cases should not be here applied, and, if so applied, there is an end to this case, since, in that view, there is no Federal contention in the record.

But, even should there be, the decision of the State Court is broad enough to sustain the judgment without reference to the Federal question presented.

In *Leathe vs. Thomas*, 207 U. S. 93, it was held:

> "In a case coming from a State court, this Court can consider only Federal questions decided adversely to the plaintiff in error, and upon which a decision was necessary to the decision of the case, and if the judgment complained of is supported also upon other and independent grounds, it must be affirmed or the writ of error dismissed."

In *Beaupre vs. Noyes*, 138 U. S. 397, it was further held:

> "Although a case from the highest court of a State may involve a Federal question, yet, if that Court proceeds upon another and distinct ground, not involving a Federal question, and sufficient in itself to maintain the judgment without reference to the Federal question involved, its judgment will be affirmed here."

But we insist that there is no Federal question involved herein. It has been held that

> "Something more than a bare assertion of such authority seems essential to the jurisdiction of this Court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States. * * * If a right were claimed under a treaty or statute, and on looking into the record it should appear that no such treaty or statute existed or was in force, it would hardly be insisted that this Court could review the decision of a State Court that the right claimed did exist."
>
> *Millingar vs. Hartupee*, 6 Wall. 258, 261, cited approvingly in *Illinois Central R. R. vs. Chicago*, 172 U. S. 656, and in which latter case it is said:

"So, in *New Orleans vs. New Orleans Water Works Co.*, 142 U. S. 79, we held that the bare averment of a Federal question is not always sufficient; that such averment must not be wholly without foundation, since, if it were otherwise, a Federal question might be set up in almost every case, and the jurisdiction of this Court invoked simply for the purpose of delay."

Fagerweather vs. Ritch, 195 U. S. 276, 299; *Farrell vs. O'Brien*, 199 U. S. 100.

It will be observed that neither the Supreme Court of Louisiana nor the Civil District Court, referred to, found it necessary to touch upon, or give effect to, the asserted subsequent law of the State which the plaintiff in error vaguely sets up as divesting rights and impairing the obligations of contracts, and for this reason, also, we submit that no case is made for review by this Honorable Court.

It has been held that,

"If the judgment of the State Court gives no effect to the subsequent law of the State, and the State Court decides the case upon grounds independent of that law, a case is not made for review upon any ground of the impairment of a contract. *Bacon vs. Texas*, 163 U. S. 207; *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 U. S. 18; *Kreiger vs. Shelby R. Co.*, 125 U. S. 39.

"The case is not altered by the fact that the State has passed an act which the defendants assert impairs the obligation of their contract, so long as the Court, in deciding their case, holds that they never had a contract, and so long as it gives judgment wholly and solely without reference to the subsequent act, and without holding or in any manner giving effect to any provision thereof."

Bacon vs. Texas, 163 U. S. 207.

We submit that the plaintiff in error has failed to show a cause of action, for the reason that, in exhibiting its title, it put itself out of court—showed that it never had title to the water bottoms claimed by it. This being a question of local law, the decision of the Supreme Court of Louisiana is final on this Court; it involves no Federal question. If this be true, then the averments of plaintiff, that it is being deprived of its property without due process of law, and the many other allegations made therein, are frivolous and without foundation in law or fact, for, if plaintiff never owned the property, it is difficult to perceive how complaint can be made that it is being deprived of same.

And this, in our opinion, obviates the necessity of discussing the many Federal questions presented by plaintiff based upon the theory of its ownership of this property, for, if plaintiff be not the owner of these lands, as was held by the lower Court and the Supreme Court of Louisiana, and if its ruling in this respect is conclusive on this Court, the plaintiff has no interest, then, in raising the Federal questions set up in its petition, which, to say the least, are not pleaded as specifically as required by the jurisprudence of this Court.

The plaintiff complains, in its assignment of errors, that the Supreme Court and lower Court could not go into the question of the ownership of the lands claimed by it; but, at most, this simply raises a question of practice, which presents no Federal question.

But, in order to recover from the defendants, it became necessary for the plaintiff to show its ownership of the land, since it could not recover from defendants damages until it showed that the property upon which the trespass

is alleged to have been committed was owned by it. This was a prerequisite to its right to recover damages, and, in the absence of a showing of title in itself, no recovery could be had. When, therefore, the plaintiff filed its petition, it described vaguely certain property as belonging to it, including certain water bottoms, but without annexing its titles thereto. It was then that exceptions of vagueness were filed and call made for its titles, whereupon plaintiff filed certain maps and diagrams in support of its alleged ownership. Upon the production of same, by supplemental petition, the Court held that, by its own annexes, it had shown no title to the said water bottoms claimed by it. In other words, the Court held that, before one can claim damages for trespass on its property, it must show ownership thereof; and this judgment, we submit, is correct.

Counsel also complains, in its assignment of error, that the *decision* of the Supreme Court deprives it of its property without due process of law, etc. Even if this were true, which is denied, this is not a matter which this Court could notice, for it has been long since settled that

> "the constitutional prohibition upon the passage of State laws impairing the obligation of contracts has reference only to the laws—that is, to the constitutional provisions or to the legislative enactments of a State, and not to *judicial decisions* or the acts of State tribunals or officers under statutes in force at the time of making the contract, the obligation of which it is alleged to have been impaired."

The plaintiff in error, on page 72 of the record, cites the case of *Lourdes vs. Huntington*, 153 U. S. 30, as enunciating a doctrine favorable to it, wherein the Court held that a certain grant therein referred to conveyed to the

grantee the lands under tide water in Huntington Bay. And so it did, but the plaintiff in error failed to quote the following passage from the opinion, which supports the contention made by defendant herein that there is no Federal question involved:

> "With respect to the matter of title, there are involved not merely the construction of public grants and charters, but also the extent and purposes to and for which the title and control of submerged lands may be passed away from the State to towns and individuals. The question is of the rights attaching to certain lands within the territorial limits of the State, and whatever becomes a settled rule of real property by the decisions of its Courts *is conclusive on this Court. Burgess vs. Seligman*, 107 U. S. 20, 33; *Gage vs. Pumpelly*, 115 U. S. 454; *Hardin vs. Jordan*, 140 U. S. 371, 382, 402; *Shirely vs. Bowlby*, 152 U. S. 1."
>
> *Lowndes vs. Huntington*, 153 U. S. 19.

In fact, on page 18 of said opinion, the very beginning of the opinion reads:

> "The questions in this case are mainly of a local character, in respect to which the settled rule of decision in the courts of the State is controlling. They relate to the form of the action, and the title of the plaintiff to submerged lands in Huntington Bay, and the special defenses of the defendant."

The settled rule of decision of the Louisiana Courts is, and has always been, as announced in the opinion of the Supreme Court of Louisiana herein, and again affirmed in *State vs. Bayou Johnson Oyster Company*, decided subsequent to the decision herein, to-wit: March 11, 1912 (Rehearing refused April 22, 1912), wherein the Court cited

with approval the decision herein sought to be reviewed, and in which the Court holds that the declared policy of the State of Louisiana has always been against alienating soil lying beneath her navigable streams. (Case not yet reported.)

The decisions cited by us on the various contentions herein raised settle, we think, the following propositions:

1. That the judgment of the Supreme Court of Louisiana is not a final judgment in such a sense as to sustain a writ of error.

2. That the decision of the Supreme Court of Louisiana does not involve a Federal question, but a question of local law, which is conclusive on this Court.

3. That, even if the Court should hold a Federal question is presented, the same was not necessary to the decision of the case, and that the judgment of the Supreme Court of Louisiana is broad enough in itself, and is supported on other and independent grounds, without reference to the Federal question presented, and without giving effect to laws which plaininff in error asserts impaired vested rights.

4. That the decision of the Supreme Court of Louisiana is correct.

We, therefore, respectfully pray that the Court hold and decree that the judgment sought to be reviewed is not a final judgment, and do further hold that it is without jurisdiction herein, and, in the alternative, that the judgment be affirmed.

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For Conservation Commission of Louisiana.